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No. 00-139-ADX Title: Microsoft Corporation, Appellant
v.
United States, et al.

Docketed: July 26, 2000 Court: United States District Court for the District of Columbia

Entry	Date	Proceedings and Orders
	Jun 21 2000	Record of USDC for DC on appeal received.
	Jul 26 2000	Statement as to jurisdiction filed. (Response due August 25, 2000)
	Jul 26 2000	Appendix of appellant filed.
	Aug 15 2000	Brief of appellee United States in opposition filed.
	Aug 15 2000	Brief amici curiae of Software and Information Industry Association, et al. filed.
	Aug 15 2000	Brief amicus curiae of Proj. to Promote Competition & Innovation in the Digital Age filed.
	Aug 15 2000	Brief of appellees New York, et al. in response to the jurisdictional statement filed.
	Aug 22 2000	Reply brief of appellant Microsoft Corporation filed.
	Aug 23 2000	DISTRIBUTED for Conference of September 25, 2000
	Sep 26 2000	The direct appeal is denied, and the case is remanded to the United States Court of Appeals for the District ofColumbia Circuit. The Clerk is directed to issue the judgment forthwith. Dissenting statement by Justice Breyer. Statement by Chief Justice Rehnquist. (Detached opinion.)
		**********
	Sep 26 2000	JUDGMENT ISSUED.

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IN THE

Supreme Court of the United States

MICROSOFT CORPORATION,

Appellant,

—v.—

UNITED STATES OF AMERICA and STATE OF NEW YORK, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JURISDICTIONAL STATEMENT

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Questions Presented

The district court certified these consolidated antitrust actions (one brought by the United States and the other by 19 States and the District of Columbia) for direct appeal to this Court pursuant to the Expediting Act, 15 U.S.C. § 29. That statute, which by its terms applies only to civil antitrust actions "in which the United States is the complainant," provides that upon certification by the district court, this Court shall "either (1) dispose of the appeal and any cross appeal in the same manner as any other direct appeal authorized by law, or (2) in its discretion, deny the direct appeal and remand the case to the court of appeals." 15 U.S.C. § 29(b). The question presented is:

> Whether this Court should exercise its discretion to decide Microsoft's appeal in the action brought by the United States or deny the direct appeal and remand the case to the United States Court of Appeals for the D.C. Circuit.*

If the Court decides to reach the merits of Microsoft's appeal(s), the questions presented for review will include:

> Whether the district court erred in holding that Microsoft's design of its Windows 95 and Windows 98 operating systems to include Web browsing functionality constituted a tie in violation of Section 1 of the Sherman Act and corresponding state-law provisions.
>
> Whether the district court erred in holding that Microsoft maintained a monopoly in the alleged market for "PC operating systems" in violation of

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* If the Court elects to decide Microsoft's appeal in the action brought by the United States, it will then have to decide whether the Expediting Act confers jurisdiction to hear Microsoft's appeal in the action brought by the States.

Section 2 of the Sherman Act and corresponding state-law provisions.

Whether the district court erred in holding that Microsoft attempted to monopolize the alleged market for "Web browsers" in violation of Section 2 of the Sherman Act and corresponding state-law provisions.

Whether the district court committed additional reversible error in its conduct of these cases by, *inter alia*, (i) denying Microsoft's repeated requests for additional discovery and time to prepare for trial, (ii) commencing trial less than five months after the complaints were filed, (iii) permitting appellees to expand the scope of their cases dramatically notwithstanding the highly expedited schedule, and (iv) admitting into evidence large amounts of inadmissible hearsay in violation of the Federal Rules of Evidence.

Whether the district court erred in entering sweeping permanent injunctive relief based on hearsay declarations without conducting an evidentiary hearing.

Whether the district court erred in entering extreme and punitive relief, including the unprecedented breakup of a unitary operating company, that was unrelated to the antitrust violations found.

Whether the district court erred in dismissing Microsoft's counterclaims against the State attorneys general under 42 U.S.C. § 1983 for seeking, under color of state law, to deprive Microsoft of its rights under federal copyright law by requiring Microsoft to license altered versions of its copyrighted operating systems.

Whether the district court's extrajudicial communications with members of the press require that the judgment be reversed and, if the cases are remanded, that they be assigned to another district judge.

List of Parties and Rule 29.6 Statement

The parties to the consolidated proceedings before the United States District Court for the District of Columbia were appellant Microsoft Corporation and appellees the United States of America, the District of Columbia and the States of California, Connecticut, Florida, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, New Mexico, New York, North Carolina, Ohio, South Carolina, Utah, West Virginia and Wisconsin. South Carolina withdrew from the case during trial.

Microsoft Corporation has no corporate parents, and no publicly held company owns 10% or more of Microsoft Corporation's stock.

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Appellant Microsoft Corporation respectfully requests that this Court deny these direct appeals from the final judgment of the United States District Court for the District of Columbia and remand these cases to the United States Court of Appeals for the D.C. Circuit.

Opinions Below

The district court's findings of fact are reported at 84 F. Supp. 2d 9 and are reprinted in the appendix hereto at pages A46-246. The district court's conclusions of law are reported at 87 F. Supp. 2d 30 and are reprinted at pages A1-43. The district court's final judgment and accompanying memorandum are unreported and are reprinted at pages A247-79.

Jurisdiction

The district court entered final judgment on June 7, 2000. Microsoft filed its notices of appeal on June 13, 2000. On June 20, 2000, the district court certified these cases for direct appeal to this Court pursuant to 15 U.S.C. § 29(b).

Statutory Provisions Involved

These cases involve Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, as well as 42 U.S.C. § 1983, 15 U.S.C. § 29 and the following state-law provisions: CAL. BUS. & PROF. CODE §§ 16720, 16726, 17200; CONN. GEN. STAT. §§ 35-26, 35-27, 35-29; D.C. CODE ANN. §§ 28-4502, 28-4503; FLA. STAT. chs. 501.204(1), 542.18, 542.19; 740 ILL. COMP. STAT. 10/3; IOWA CODE §§ 553.4, 553.5; KAN. STAT. ANN. §§ 50-101 *et seq.*; KY. REV. STAT. ANN. §§ 367.170, 367.175; LA. REV. STAT. ANN. §§ 51:122, 51.123, 51:1405; MD. CODE ANN., COM. LAW § 11-204; MASS. GEN. LAWS ch. 93A, § 2; MICH. COMP. LAWS §§ 445.772, 445.773; MINN. STAT. § 325D.52; N.M. STAT. ANN. §§ 57-1-1, 57-1-2; N.Y. GEN. BUS. LAW § 340; N.C. GEN. STAT. §§ 75-1.1, 75-2.1; OHIO REV. CODE ANN. §§ 1331.01, 1331.02; UTAH CODE ANN. § 76-10-914; W. VA. CODE §§ 47-18-3, 47-18-4; WIS. STAT. § 133.03(1)-(2).

Statement of the Case

These appeals are from a final judgment of the district court holding Microsoft liable under Sections 1 and 2 of the Sherman Act and the corresponding provisions of state law listed above. Judgment was entered following a 78-day trial in two consolidated actions, one brought by the U.S. Department of Justice ("DOJ") and the other by 19 States and the District of Columbia. The judgment embodies one of the most complex and punitive antitrust decrees in history.

Microsoft's appeals raise numerous factual and legal issues as to both liability and relief under federal and state law, and full and fair consideration of those appeals would impose an extraordinary burden on this Court. There are no exigent circumstances that justify the burden of a direct appeal or warrant a deviation from normal appellate procedure.

To the contrary, the administration of justice would be best served by allowing Microsoft's appeals to follow the normal course to the court of appeals. It is impossible in a 30-page jurisdictional statement to address all of the serious factual, procedural and legal issues to be raised on appeal. This statement demonstrates, however, that those issues are numerous and that they are particularly well-suited for review by the court of appeals, which has already taken the unusual step of ordering that the appeals be heard *en banc*. If any issues remain that merit this Court's attention after the court of appeals' decision, this Court can review them on certiorari.

A. Background

The proceedings below went badly awry from the outset. When these actions were filed in May 1998, Assistant Attorney General Joel I. Klein announced that the DOJ was embarking on a "surgical strike," bringing a tightly focused case that centered on Microsoft's design of its Windows operating system to include Web browsing functionality. Over the next two years, however, the district court permitted appellees to transform their cases beyond recognition. In

the course of doing so, the district court, at appellees' urging, committed an array of serious procedural and substantive errors. As a result, what began as a relatively narrow challenge to Microsoft's inclusion of new functionality in Windows ended with the entry of an unprecedented order splitting the company in two.

The complaints in these actions allege two claims under Section 1 of the Sherman Act and its state-law analogues (unlawful tying and exclusive dealing) and two claims under Section 2 and its state-law analogues (maintenance of a monopoly in "PC operating systems" and attempted monopolization of "Web browsers"). Appellees' central allegation was that Microsoft unlawfully foreclosed Netscape from distributing and promoting its Web browsing software, called Navigator, by (i) including Microsoft's own Web browsing software, called Internet Explorer, in its Windows 95 and Windows 98 operating systems, (ii) entering into allegedly exclusive distribution and promotion agreements relating to Internet Explorer, and (iii) not granting computer manufacturers ("OEMs") the right to modify the initial Windows startup sequence and the Windows desktop to hide Internet Explorer from end users.[1]

Appellees contended that Microsoft sought to limit Netscape's distribution of Navigator because it was concerned that Navigator could become a competing "platform" to which application programs would be written, and thus might reduce what appellees viewed as the sole barrier to entry into the operating system business. This purported barrier—referred to as the "applications barrier to entry"—allegedly results from the large number of applications written for Windows relative to other operating systems. In appellees' view, this supposed barrier could be eroded if more applications were written for so-called "middleware"

[1] Microsoft asserted counterclaims under 42 U.S.C. § 1983, alleging that the State attorneys general sought, under color of state law, to deprive Microsoft of its rights under federal copyright law by requiring it to license altered versions of its copyrighted operating systems.

such as Navigator with versions that run on multiple operating systems.

Appellees' complaints sought essentially the same narrow relief, namely, an order enjoining Microsoft from:

> (1) entering into or enforcing certain contractual provisions which allegedly foreclose distribution and/or promotion of competing Internet browsers; (2) distributing a "bundled" version of its operating system and browser unless Microsoft provides a practical way of removing browser functions and provides OEMs that do not wish to license the browser an appropriate deduction from the royalty fee; (3) distributing a "bundled" version of its operating system and browser unless Microsoft treats Netscape Corporation's browser the same as its own with respect to inclusion and removal; and (4) retaliating against any OEM that chooses to remove Microsoft's browser from Windows 98.

United States v. *Microsoft Corp.*, Nos. 98-1232, 1233, 1998 WL 614485, at *1 (D.D.C. Sept. 14, 1998). Together with their complaints, appellees filed preliminary injunction motions seeking basically the same relief.

Following an initial conference, the district court consolidated the two actions pursuant to Rule 42(a) of the Federal Rules of Civil Procedure. The district court also advanced the trial on the merits and consolidated it with the preliminary injunction hearing pursuant to Rule 65(a)(2). Over Microsoft's objection, the district court scheduled trial to begin less than four months later.

On June 23, 1998, the court of appeals reversed an earlier ruling of the district court in a closely-related action brought by the DOJ against Microsoft under a 1994 consent decree. *United States* v. *Microsoft Corp.*, 147 F.3d 935 (D.C. Cir. 1998). On the record before it, the court of appeals held that Windows 95 and Internet Explorer 4.0 constitute an "integrated product" because there are "facially plausible benefits" to the "integrated design" of Windows 95, including its Internet Explorer components, "as compared to an operating system combined with a stand-alone browser such as Netscape's Navigator." *Id.* at 950.

Based largely on the court of appeals' decision, Microsoft moved for summary judgment. In denying that motion, the district court acknowledged that the court of appeals had articulated the controlling legal test for "determining whether an integration amounts to a single product for purposes of evaluating a tying claim." 1998 WL 614485, at *10. The district court denied Microsoft's summary judgment motion, however, because it could not "determine whether Windows and IE are 'separate products' until it becomes clear what are the synergistic benefits that are unique to the Windows/IE combination, *i.e.*, benefits that could not be obtained by combining another browser with Windows." *Id.* at *12.

Although the district court denied Microsoft's summary judgment motion, the court of appeals' decision eviscerated the core of appellees' case, namely, their contention that Microsoft had "tied" Internet Explorer to Windows. Appellees responded to the court of appeals' decision by dramatically expanding the scope of their case, raising new allegations not included in their complaints and seeking to convert a narrow case into an omnibus Section 2 monopoly maintenance action. Over Microsoft's objection, appellees advanced new allegations concerning Microsoft's interactions with Intel, Apple, Sun Microsystems and RealNetworks.

Despite the transformation of the case, the district court pressed ahead with its plan for a compressed and expedited trial. In doing so, the district court assured Microsoft that it "would not be making any findings" and "would not predicate any relief" on matters unrelated to the conduct challenged in the complaints—assurances the district court would later repudiate. On this basis, the district court refused to give Microsoft additional time to conduct discovery and prepare for trial.

Although Microsoft moved for a continuance, trial began on October 19, 1998, just five months after the complaints were filed. The parties concluded their cases-in-chief on February 26, 1999, and presented rebuttal evidence between June 1, 1999 and June 24, 1999. The 78-day trial generated a very large record, consisting of 1,815 pages of written direct testimony, 13,466 pages of trial transcript and 2,695 trial exhibits. Much of the evidence relates to highly technical issues of software design.

At trial, the district court largely suspended application of the Federal Rules of Evidence, admitting numerous newspaper and magazine articles and other rank hearsay. For example, 69 paragraphs of the written direct testimony of James Barksdale, then CEO of Netscape and appellees' first witness, contained inadmissible hearsay, often multiple levels of hearsay. Yet, the district court denied Microsoft's repeated motions *in limine* to exclude such hearsay.

B. The District Court's Rulings

On September 10, 1999, Microsoft and appellees filed their revised proposed findings of fact, which were 679 and 876 pages long, respectively. The district court issued its findings of fact on November 5, 1999. Although 412 paragraphs long, the district court's findings do not contain a single citation to the record, making it impossible to ascertain the basis for many findings and severely complicating review of the district court's determinations. Many of the district court's "findings," moreover, consist of nothing more than sweeping, conclusory assertions. (*E.g.*, Findings ¶¶ 409-12 (A244-46).) The district court also repeatedly ignored uncontradicted evidence submitted by Microsoft on crucial points, such as Paul Maritz's explanation of why Microsoft did not charge separately for Internet Explorer and Jim Allchin's description of the many benefits flowing from the integrated design of Windows that cannot be duplicated by combining an operating system with a stand-alone Web browser like Navigator.

After the district court made its findings of fact, the parties submitted proposed conclusions of law. The district court also invited Professor Lawrence Lessig of Harvard Law School to participate as *amicus curiae*, stating that Lessig would "submit his views exclusively on the issue of technological tying," a subject on which the district court said he was "uniquely qualified to offer advice." In his brief, Lessig stated that "under the Court of Appeals test, Microsoft must prevail."

The district court nevertheless held in its conclusions of law that Microsoft violated Section 1 of the Sherman Act and corresponding state-law provisions by unlawfully tying Internet Explorer to Windows. The district court, however, rejected appellees' exclusive dealing claim under federal and state law, holding that the challenged agreements "did not foreclose enough of the relevant market to constitute a § 1 violation." (A38.) The district court also determined that Microsoft had violated Section 2 and corresponding state-law provisions by maintaining a monopoly in "PC operating systems" and by attempting to monopolize "Web browsers," even though distribution foreclosure is a central premise of both of those violations.

1. Section 1 Tying

Having been told by its "uniquely qualified" *amicus* that Microsoft "must prevail" under the court of appeals' test, the district court refused to apply that test. (A25.) It did so despite its recognition that the court of appeals' June 1998 decision "sought to guide this Court, insofar as practicable, in the further proceedings it fully expected to ensue on the tying issue." (A26.) The district court held that the court of appeals' "undemanding test" was "inconsistent with the pertinent Supreme Court precedents" (A26)—*Jefferson Parish Hospital District No. 2* v. *Hyde*, 466 U.S. 2 (1984), and *Eastman Kodak Co.* v. *Image Technical Services, Inc.*, 504 U.S. 451 (1992)—even though the court of appeals had expressly rejected the assertion that the "consumer-demand"

test set out in those decisions applies to claims of "technological tying." 147 F.3d at 946-47. The district court asserted that it was obliged to follow the court of appeals' pronouncements only "until the trail falters." (A26.)

2. Section 1 Exclusive Dealing

The district court dismissed appellees' exclusive dealing claims under Section 1 and analogous state-law provisions because the challenged agreements did not exclude Netscape from the marketplace:

> Microsoft's multiple agreements with distributors did not ultimately deprive Netscape of the ability to *have access to every PC user worldwide* to offer an opportunity to install Navigator. Navigator can be downloaded from the Internet. It is available through myriad retail channels. It can (and has been) mailed directly to an unlimited number of households.

(A37 (emphasis added); *see also* Findings ¶ 357 (A218).) The district court determined that in 1998 alone, "Netscape was able to distribute 160 million copies of Navigator, contributing to an increase in its installed base from 15 million in 1996 to 33 million in December 1998" (A37-38; *see also* Findings ¶ 378 (A228-29)), the very period in which Microsoft had supposedly prevented Netscape from promoting and distributing Navigator. The district court added, however, that "[t]he fact that Microsoft's arrangements with various firms did not foreclose enough of the relevant market to constitute a § 1 violation in no way detracts from the Court's assignment of liability for the same arrangements under § 2." (A38.)

3. Section 2 Monopoly Maintenance

The district court held that Microsoft possesses monopoly power in the purported market for "PC operating systems." (A3-6.) Despite having found that Netscape had access "to every PC user worldwide" (A37), the district court held that

Microsoft unlawfully maintained its putative operating system monopoly by excluding Navigator from two channels of distribution—the OEM channel and the Internet access provider ("IAP") channel. (A9-16.)[2]

The district court concluded that Microsoft's development of new operating systems that included Web browsing functionality and its refusal to permit OEMs to "reconfigure or modify" its copyrighted operating systems to hide access to that functionality reduced the likelihood that OEMs would preinstall Navigator on their new computers. (A10-11.) The district court further found that Microsoft's agreements with Internet service providers and online services "ensure[d] that the IAP channel would generate browser usage share for Internet Explorer rather than Navigator." (A14.)

The district court held that other acts challenged by appellees, while not anticompetitive in and of themselves, "supplemented Microsoft's efforts in the OEM and IAP channels." (A17.) Relying on *Continental Ore Co.* v. *Union Carbide & Carbon Co.*, 370 U.S. 690 (1962), the district court stated that conduct that was not itself anticompetitive could become unlawful when viewed together with other conduct. (A19-20.) According to the district court, although not all of the challenged acts "independently satisfy the second element of a § 2 monopoly maintenance claim," viewing "Microsoft's conduct as a whole . . . reinforces the conviction that it was predacious." (A20.)

4. Section 2 Attempted Monopolization

The district court also sustained appellees' attempted monopolization claim. Although it acknowledged that

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[2] The district court concluded that Microsoft had maintained an operating system monopoly by supposedly foreclosing Netscape's access to two distribution channels even though (i) the product that was allegedly foreclosed, *i.e.*, Web browsers, constituted, in the district court's view, a separate product market and (ii) only through a long and speculative chain of causation could restricting the distribution of Web browsers have any impact on Microsoft's position in operating systems.

Microsoft's intent was to demonstrate to software developers that Navigator, the leading Web browser at the time, "would never emerge as the standard software employed to browse the Web," the district court concluded that Microsoft possessed the requisite specific intent to monopolize because "there is no evidence that Microsoft tried" to prevent its efforts "from achieving overkill." (A22.) In so ruling, the district court erroneously invoked a *negligence* standard in resolving the issue of *specific intent* necessary for attempted monopolization:

> While Microsoft's top executives never expressly declared acquisition of monopoly power in the browser market to be the objective, they knew, *or should have known*, that the tactics they actually employed were likely to push Internet Explorer's shares to those extreme heights.

(A22 (emphasis added).)

The district court further held that there is a dangerous probability that Microsoft will obtain monopoly power in "Web browsers." (A22-23.) First, the district court concluded that Microsoft's discussions with Netscape in June 1995—before the release of Windows 95 with its built-in Web browsing functionality—created a dangerous probability of monopolization, even though the district court acknowledged that Netscape rejected whatever proposal Microsoft supposedly made at that time. (A23.) Second, the district court noted that Internet Explorer's share of browser usage had subsequently "risen above fifty percent" (A24), although it recognized that over one-third of Internet Explorer's usage share is controlled by AOL, a fierce Microsoft competitor that acquired Netscape during the trial (Findings ¶ 303 (A192)).

C. The Final Judgment

The district court's order accompanying its conclusions of law stated that it would enter relief "following proceedings

to be established by further Order of the Court." (A45.) The district court thereafter held two chambers conferences to discuss procedures to be employed during the remedies phase of trial. At the first conference—held the day after the district court issued its conclusions of law rejecting the court of appeals' "technological tying" test—the district court disclosed its plan to invite the DOJ to bypass the court of appeals by seeking direct review in this Court pursuant to the Expediting Act.

At both conferences, Microsoft stated that it could not take a position on the procedures for the remedies phase of trial until it received appellees' proposal for relief. The district court responded that this position was "fair" and "reasonable." When asked by Microsoft whether it "contemplate[d] further proceedings of some kind or another" on remedies, the district court replied, "I would assume that there would be further proceedings." The district court then stated that it might "replicate the procedure at trial with testimony in written form subject to cross-examination." The district court subsequently issued Scheduling Order No. 8, which required Microsoft to submit only "its summary response to plaintiffs' proposal(s), including its objections to any or all proposed forms of permanent injunction, any counter-proposal(s) to the plaintiffs' submission(s), and its recommendations for future proceedings on the issue of remedy."

On April 28, 2000, appellees filed their proposed decree, together with six supporting declarations. Although such radical relief was not even hinted at in their complaints, appellees (with two States dissenting) requested that Microsoft be split into two companies, one that would receive Microsoft's operating systems and another that would receive Microsoft's other products (including numerous operating system components). While the breakup proposal was the most dramatic aspect of the decree, other proposed provisions were equally extreme, extending far beyond the case that was tried and encompassing products

wholly outside the markets defined by the district court. Appellees requested, *inter alia*, that Microsoft be required to disclose proprietary information concerning its desktop, server and embedded operating systems—including source code—to any firm claiming a desire to make its products "interoperate effectively" with those operating systems, a group that includes all of Microsoft's competitors. Appellees further requested that Microsoft be required to redesign its operating systems to enable OEMs and end users to substitute third-party software for components of the operating system, thus forcing Microsoft to offer operating system features on an *à la carte* basis and severely hindering Microsoft's ability to improve its products.

On May 10, 2000, Microsoft submitted the materials required by Scheduling Order No. 8, expressly requesting discovery and an evidentiary hearing on the issue of relief. Microsoft also filed a motion for summary rejection of appellees' breakup proposal, arguing that dismemberment of Microsoft is unwarranted as a matter of law.

The district court heard argument on May 24, 2000. Despite the prior discussions in chambers and the terms of Scheduling Order No. 8, the district court announced, "I intend to proceed to the merits of the remedy." At the conclusion of the argument, Microsoft asked what further proceedings there would be on relief, to which the district court responded, "I'm not contemplating any further process."

On June 7, 2000, the district court signed appellees' proposed final judgment as ultimately proffered without a single substantive change. It thus entered radical and unwarranted permanent injunctive relief, including the breakup of Microsoft, without conducting an evidentiary hearing or making any findings on the issue of relief. In an accompanying memorandum, bereft of a single citation to case law or evidence, the district court stated that "a structural remedy has become imperative" because "Microsoft does not yet concede that any of its business practices violated the Sherman Act." (A249.) The district court criticized

Microsoft for being "unwilling to accept the notion that it broke the law" (A249), even though Microsoft's exercise of its appellate rights provides no conceivable basis for imposing punitive sanctions. Far from finding that the relief entered would increase competition, the district court remarked that even "purportedly knowledgeable people" do not know what "may or may not ensue." (A250.) The district court also rejected the notion of having an evidentiary hearing to explore that question because "testimonial predictions of future events" are "less reliable even than testimony as to historical fact." (A250.) In a candid abdication of its Article III responsibilities, the district court offered the following rationale for its entry of the final judgment presented by appellees:

> Plaintiffs won the case, and for that reason alone have some entitlement to a remedy of their choice. Moreover, plaintiffs' proposed final judgment is the collective work product of senior antitrust law enforcement officials of the United States Department of Justice and the Attorneys General of 19 states, in conjunction with multiple consultants. These officials are by reason of office obliged and expected to consider—and to act in—the public interest; Microsoft is not.

(A250-51 (footnote omitted).)

Microsoft filed its notices of appeal on June 13, 2000. Less than one hour later, the court of appeals *sua sponte* issued orders providing that "all motions and petitions filed in these cases shall be heard by the court sitting *en banc*." (A311-12.) Later that evening, appellees presented a joint motion to the district court for certification of direct appeal to this Court pursuant to 15 U.S.C. § 29(b). On June 20, 2000, the district court granted appellees' motion with no explanation except to repeat the language of the Expediting Act. The district court also stayed the judgment in its entirety until Microsoft's appeals are decided.

D. The District Court's Press Interviews

Beginning the day after judgment was entered, numerous news organizations, including the *New York Times*, *Wall Street Journal*, *Los Angeles Times*, *Washington Post*, *Newsweek*, *USA Today*, Marketplace Radio and National Public Radio, published stories based on interviews with the district court. It was reported that the district court, without notice to Microsoft, had been granting extrajudicial interviews to members of the press for nine months, *i.e.*, since before entering its findings of fact.[3] The district court's blunt comments to the press raise serious questions about its impartiality and betray a misguided belief that appellees were entitled to the remedy of their choice, no matter how extreme, simply because they had prevailed on liability.

For instance, the *Wall Street Journal* quoted the district court as giving the following explanation for its refusal to provide Microsoft with a hearing before entering relief: "[I]t's procedurally unusual to do what Microsoft is proposing—are you aware of very many cases in which the defendant can argue with the jury about what an appropriate sanction should be? Were the Japanese allowed to propose the terms of their surrender? The government won the case." John R. Wilke, *For Antitrust Judge, Trust, or Lack of It, Really Was the Issue*, WALL ST. J., June 8, 2000, at A8.

The *New York Times* reported that "Judge Jackson agreed to be interviewed several times after testimony in the trial had ended, with the understanding that his comments could not be published until the case had left his courtroom. The discussions, beginning last September, were friendly, informal and unstructured." Joel Brinkley & Steve Lohr, *Retracing the Missteps in the Microsoft Defense*, N.Y.

[3] Canon 3A(6) of the Code of Conduct for United States Judges provides: "A judge should avoid public comment on the merits of a pending or impending action . . . ." 175 F.R.D. 364, 367 (1998). The official commentary to this canon states: "The admonishment against public comment about the merits of a pending or impending action continues until completion of the appellate process." *Id.* at 370.

TIMES, June 9, 2000, at C8. When asked by the *New York Times* about the possibility of a breakup of Microsoft during a February 2000 interview—described as "a rare audience with a sitting judge during the course of a trial"—the district court is quoted as saying, "I am not sure I am competent to do that." *Id.* at A1. When asked in a later interview why it had simply rubberstamped appellees' proposed relief, including a breakup of Microsoft, the district court apparently stated, "I am not in a position to duplicate that and reengineer their work. There's no way I can equip myself to do a better job than they have done." *Id.* at C9. Lastly, in a repudiation of a fundamental tenet of American jurisprudence, the district court is quoted as offering the following rationale for denying Microsoft an evidentiary hearing on relief, "I am not aware of any case authority that says I have to give them any due process at all. The case is over. They lost." *Id.* at C8.

Reasons for Denying Direct Appeal

The Expediting Act gives this Court unqualified discretion to deny direct appeal and remand these cases to the court of appeals. 15 U.S.C. § 29(b). In certifying these cases, the district court made no determination that Microsoft's appeals were suitable for immediate consideration by this Court. In fact, appellees advised the district court that suitability for direct review was "not properly a part of [the district court's] certification decision" because the "Expediting Act affords the Supreme Court broad discretion to remand an appeal to the court of appeals if it considers the case inappropriate for its plenary review."

In exercising "its discretion" whether to hear these appeals, 15 U.S.C. § 29(b), this Court owes no deference to the district court's decision to certify the appeals under the Expediting Act. *Cf. Digital Equip. Corp.* v. *Desktop Direct, Inc.*, 511 U.S. 863, 883 n.9 (1994) (court of appeals has broad discretion to decline appeal certified under 28 U.S.C. § 1292(b)); 16 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3929, at 378 (1996) ("The

discretion of the court of appeals [to decline an appeal under Section 1292(b)] is so broad that it is difficult to imagine any controlling limit . . . .”). Rather, Congress amended the Expediting Act to give this Court unfettered discretion to consider the nature and number of issues raised by an appeal and to determine whether the judicial process would be better served by initial review in the court of appeals.

This is not a case in which the Court should exercise its discretion to hear a direct appeal, thereby undertaking the onerous task of sifting through a large and complex record and forgoing the many benefits of intermediate appellate review. As two leading commentators observed, without the assistance of the court of appeals,

> the Supreme Court is often forced to ferret out the issues and the pertinent facts from the raw district court records. All issues, whether important or not, must sometimes be resolved by the Court where no other appellate review is possible. That burden can be particularly heavy when a complex civil antitrust case brought by the Government is appealed directly from a district court . . . .

Bennett Boskey & Eugene Gressman, *Recent Reforms in the Federal Judicial Structure*, 67 F.R.D. 135, 145 (1976). There is no need for this Court to assume such a burden here. Indeed, the number and nature of the errors below militate strongly in favor of review by the court of appeals.

I. The Appeals Raise Many Difficult Factual Issues.

Microsoft's appeals raise numerous complicated factual issues. Resolution of these issues will require the reviewing court to sift through an extensive record. That task will be even more demanding because of the complexity of the technologies at issue and the district court's failure to provide *any* citations to the record to support its findings. Unlike the courts of appeals, which are charged with combing through voluminous trial records to resolve factual

challenges, this Court is a court of law, not “a court for correction of errors in fact finding.” *Graver Tank & Mfg. Co.* v. *Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949).

In fact, Congress amended the Expediting Act in 1974 to relieve this Court of mandatory direct review of civil antitrust actions brought by the United States precisely because of the Court's repeatedly expressed conviction that such factual review should be performed by the court of appeals:

> Many civil antitrust cases require the Supreme Court to read thousands of pages of transcript from the district court. A question arises as to the adequacy of the review the Supreme Court can give to those cases in which there are voluminous trial records. Almost all the present Justices have, both in and out of Court, asked that these cases go first to the courts of appeals.

S. REP. NO. 93-298, at 8 (1973). The 1974 amendments to the Expediting Act thus “narrowed, almost to the point of extinction, the right to appeal directly to the Supreme Court” from judgments entered in civil antitrust cases brought by the United States. ROBERT L. STERN ET AL., SUPREME COURT PRACTICE § 2.7, at 50 (7th ed. 1993).

Prior to the 1974 amendments to the Expediting Act, this Court had stated that “[d]irect appeals not only place a great burden on the Court but also deprive [it] of the valuable assistance of the Court of Appeals.” *United States* v. *Singer Mfg. Co.*, 374 U.S. 174, 175 n.1 (1963) (1,723-page record). Justice Harlan observed that “there is certainly much to be said in favor of relieving this Court of the often arduous task of searching through voluminous trial testimony and exhibits to determine whether a single district judge's findings of fact are supportable.” *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 364 (1962) (Harlan, J., dissenting in part and concurring in part). Chief Justice Burger referred to “the unsoundness of the direct appeal permitted in cases of this kind under 15 U.S.C. § 29,” stating that in a “factually complicated case,” this Court is “immeasurably aided by the screening process

provided by a Court of Appeals review." *Ford Motor Co.* v. *United States*, 405 U.S. 562, 595 n.5 (1972) (Burger, C.J., concurring in part and dissenting in part). And Justice Marshall likewise noted that direct appeal "unjustifiably burdens this Court with inadequately sifted records and with cases that could be disposed of by review in the court of appeals." *Tidewater Oil Co.* v. *United States*, 409 U.S. 151, 170 (1972).

Many of the district court's findings of fact are clearly erroneous, particularly those regarding (i) Microsoft's supposed foreclosure of Netscape from specific channels of distribution, and (ii) Microsoft's design of Windows 95 and Windows 98. For instance, the district court found, apparently based on testimony of Netscape CEO Barksdale, that "Microsoft has largely succeeded in exiling Navigator from the crucial OEM distribution channel." (Findings ¶ 239 (A159).) According to the district court, "[b]y the beginning of January 1999, Navigator was present on the desktop of only a tiny percentage of the PCs that OEMs were shipping." (*Id.* (A160).) In fact, documents reporting the results of AOL's due diligence investigation prior to its acquisition of Netscape—elsewhere relied on by the district court—state that as of 1998 Navigator was distributed on "22% of OEM shipments." When confronted with these documents at trial, appellees' economist, Frank Fisher, acknowledged that Barksdale's testimony was an "exaggeration." No probative evidence thus supports the district court's finding of foreclosure in the OEM channel.

The district court also found that Microsoft "bound" Internet Explorer to Windows 98 "by placing code specific to Web browsing in the same files as code that provided operating system functions." (*Id.* ¶ 161 (A122).) Once again, no probative evidence supports that finding. At trial, appellees called three technical experts, two of whom, Glenn Weadock and David Farber, admitted that they had *never seen* the source code for Windows 98. Appellees' third technical expert, Edward Felten, acknowledged that he did no

"study of what code might be removable or not removable" from Windows 98 because it was "specific to Web browsing." In contrast, Jim Allchin, the senior vice president responsible for the development of Windows 98, testified without contradiction that there is no code specific to Web browsing that is mixed with code specific to operating system functions, but rather that the *very same code* provides both functions:

> The very same software code in Windows 98 that provides Web browsing functionality *also* provides (i) platform support to developers, (ii) user interface software (for Windows itself and other software products) and (iii) access to information stored in locations other than the Internet. That software code is called Internet Explorer, and it is so central to the operation of Windows 98 that the operating system would fail to function if it were removed.

The task of reviewing these and other factual determinations will be complicated by the district court's admission of large amounts of hearsay and by its failure to include any citations to the record in its findings of fact. Moreover, to the extent appellees argue that the district court's evidentiary and other errors were harmless, the reviewing court will have to comb through the *entire* record to make that determination. 11 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2883, at 448-49 (1995) ("The entire record must be considered and the probable effect of the error determined in light of all of the evidence.").

II. The Appeals Raise Numerous Legal Issues.

These appeals are not confined to one or two legal issues of the sort this Court normally considers on certiorari. They instead involve a wide range of procedural and substantive issues more appropriately resolved by the court of appeals.

Many of the issues raised are important only to resolution of these particular cases, presenting mixed questions of fact

and law. For example, the district court adopted a market definition that is so narrow that it excludes *both* Apple's Mac OS operating system (Findings ¶¶ 20-21 (A52-53)) *and* the competing platform technologies—Navigator and Java—that the district court determined posed the greatest competitive threat to Microsoft's putative operating system monopoly (*id.* ¶¶ 68-77 (A78-82)). The district court also erroneously held that Microsoft's position in operating systems is protected by the so-called "applications barrier to entry." (*Id.* ¶¶ 36-52 (A61-70).) In finding that the burden of convincing software developers to write applications for platform software is an entry barrier, the district court confused a fundamental element of competition in the platform business with a barrier to entry. As the district court found, Microsoft itself invests hundreds of millions of dollars "each year inducing [software developers] to write applications for Windows." (*Id.* ¶ 43 (A65).)

Other issues raised involve the misapplication of settled law. For example, the district court erroneously branded as anticompetitive Microsoft's efforts "to maximize Internet Explorer's share of browser usage at Navigator's expense" at a time when Navigator enjoyed a substantial majority of usage. (A10.) Indeed, the notion that Microsoft's desire to increase Internet Explorer's usage share somehow rendered its conduct anticompetitive was a recurring theme of the district court's ruling. By condemning vigorous competition by a new entrant into a purported market, the district court evinced a profound misunderstanding of the antitrust laws.[4]

Still other issues involve irreconcilable conflicts between the district court's own findings of fact and its conclusions of

[4] *See Spectrum Sports, Inc.* v. *McQuillan*, 506 U.S. 447, 458 (1993) ("The purpose of the Act is not to protect businesses from the working of the market; it is to protect the public from the failure of the market."); *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 594 (1986) ("[M]istaken inferences in cases such as this one are especially costly, because they chill the very conduct the antitrust laws are designed to protect.").

law. For instance, the district court found that Microsoft's intent was to demonstrate to software developers that "Navigator would not become the standard" Web browsing software (Findings ¶ 133 (A108)) at a time when "Navigator seemed well on its way to becoming the standard" (*id.* ¶ 377 (A228)). Yet, in its conclusions of law, the district court determined that Microsoft's efforts to *prevent* Netscape from monopolizing Web browsing software established that Microsoft itself had the requisite specific intent to monopolize "Web browsers."

Although the following list of errors, set out in roughly chronological order, is not exhaustive, it reflects the principal legal issues Microsoft intends to raise on appeal:

- whether the district court erred in starting trial five months after the complaints were filed despite allowing appellees to broaden their case dramatically;
- whether the district court erred in admitting large amounts of inadmissible hearsay over Microsoft's objection;
- whether the district court erred in holding that the relevant product market is limited to "PC operating systems," thereby excluding the principal competitive threats to Windows;
- whether the district court erred in holding that the need to persuade software developers to write applications for a platform constitutes a barrier to entry into the relevant product market;
- whether the district court erred in holding that Microsoft possesses monopoly power in a relevant product market;
- whether the district court erred in holding that Microsoft maintained a monopoly through anticompetitive conduct by seeking to maximize Internet Explorer's usage share at Navigator's expense;
- whether the district court erred in holding that appellees need not establish a causal connection between the

alleged anticompetitive conduct and Microsoft's supposed maintenance of a monopoly;

- whether the district court erred in holding that acts that are not themselves anticompetitive under controlling legal principles can become anticompetitive when viewed in combination with other acts;
- whether the district court erred in holding that Microsoft's development of new operating systems that include Web browsing functionality constituted an unlawful tie;
- whether the district court erred in holding that Internet Explorer is unlawfully tied to Windows when Navigator runs perfectly well on that operating system and tens of millions of people use Navigator with Windows;
- whether the district court erred in holding that agreements that did not violate Section 1 of the Sherman Act because they did not foreclose Netscape's access to consumers nevertheless violated Section 2;
- whether the district court erred in holding that provisions in Microsoft's license agreements with OEMs that, consistent with Microsoft's rights under federal copyright law, do not permit OEMs to modify Microsoft's copyrighted operating systems without Microsoft's permission violate Section 2 of the Sherman Act;
- whether the district court erred in holding that Microsoft possessed a specific intent to monopolize the alleged market for "Web browsers" when the district court found that Microsoft's intent was to prevent Netscape from achieving such a monopoly;
- whether the district court erred in holding that there is a dangerous probability that Microsoft will achieve monopoly power in the alleged market for "Web browsers" when the district court found that over one-third of Internet Explorer's usage share is controlled by AOL, which now owns Navigator;
- whether the district court erred in holding that Microsoft's June 1995 discussions with Netscape created

a dangerous probability of monopolization of the alleged market for "Web browsers" when it is undisputed that Netscape rejected whatever proposal Microsoft supposedly made;

- whether the district court erred in dismissing Microsoft's counterclaims against the State attorneys general for seeking, under color of state law, to deprive Microsoft of its rights under federal copyright law;
- whether the district court erred in entering a sweeping permanent injunction without an evidentiary hearing on relief;
- whether the district court erred in imposing extreme and punitive relief unrelated to the antitrust violations found; and
- whether the district court's extrajudicial communications with the press concerning the merits of these cases in violation of Canon 3A(6) of the Code of Conduct for United States Judges require that the judgment below be reversed and, if the cases are remanded, that they be assigned to another district judge.

The sheer number of issues raised by Microsoft's appeals makes these cases unsuitable for direct appeal. To the extent that some of the legal issues may ultimately be dispositive and involve "an important question of federal law that has not been, but should be, settled by this Court," S. CT. R. 10(c), this Court's review would be aided immensely by having the court of appeals clear out the procedural and factual underbrush first.

III. The District Court Should Not Be Permitted To Use the Expediting Act To Evade the Authority of the Court of Appeals.

On the most important issue in these cases—technological tying—the district court expressly rejected binding circuit precedent, holding that the court of appeals' test is inconsistent with two decisions of this Court. The court of appeals, however, expressly considered both of those decisions in

fashioning its test. The district court refused to apply circuit precedent despite acknowledging that the court of appeals had "anticipated the instant case" and "sought to guide this Court, insofar as practicable, in the further proceedings it fully expected to ensue on the tying issue." (A26.)

The day after rejecting the court of appeals' test, the district court disclosed its intention to invite the DOJ to seek direct review in this Court: "I would be remiss if I didn't tell you that I will be inviting from the government a motion under 15 U.S.C. § 29(b), the Expediting Act, to provide for direct review in the Supreme Court."

Congress did not intend the Expediting Act to render district courts "circuitless" in antitrust actions brought by the United States. Our federal court system is hierarchical. *See Agostini* v. *Felton*, 521 U.S. 203, 237-38 (1997); *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989); *Hutto* v. *Davis*, 454 U.S. 370, 374-75 (1982). If a decision of the court of appeals applies, the district court is required to follow it, leaving to the court of appeals or this Court the prerogative of rejecting that decision. *United States* v. *Torres*, 115 F.3d 1033, 1036 (D.C. Cir. 1997) ("[D]istrict judges, like panels of this court, are obligated to follow controlling circuit precedent until either we, sitting *en banc*, or the Supreme Court overrule it.").

The Expediting Act is not a vehicle for annulling the authority of the court of appeals. This Court should not countenance the district court's attempt, abetted by appellees, to circumvent appellate review by the court of appeals, "the regular court for reviewing orders of the District Court here concerned." *Aaron* v. *Cooper*, 357 U.S. 566, 567 (1958).

IV. Immediate Consideration of Microsoft's Appeals by This Court Is Not of General Public Importance in the Administration of Justice.

"Whatever may have been the wisdom of the Expediting Act in providing direct appeals in antitrust cases at the time of its enactment in 1903," that rationale no longer applies.

Singer Mfg. Co., 374 U.S. at 175 n.1. In 1903, the Sherman Act was only 13 years old, and the courts of appeals had been in existence only 12 years. Because the courts of appeals were relatively new, they were not thought capable of handling appeals in civil antitrust actions brought by the United States, which at the time raised novel and important issues concerning governmental regulation of private enterprise. *See* Robert C. Bonges, *The Antitrust Expediting Act—A Critical Reappraisal*, 63 MICH. L. REV. 1240, 1241-42 (1965); *see also Tidewater Oil Co.*, 409 U.S. at 156. As Justice Harlan noted almost 40 years ago, however, "[t]he legal issues in most civil antitrust cases are no longer so novel or unsettled as to make them especially appropriate for initial appellate consideration by this Court, as compared with those in a variety of other areas of federal law." *Brown Shoe*, 370 U.S. at 364 (Harlan, J., dissenting in part and concurring in part). In fact, the courts of appeals have played a vital role in the development of our antitrust jurisprudence. *See, e.g., Barry Wright Corp.* v. *ITT Grinnell Corp.*, 724 F.2d 227 (1st Cir. 1983); *MCI* v. *AT&T*, 708 F.2d 1081 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983); *Berkey Photo, Inc.* v. *Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980).

Since the Expediting Act was amended in 1974, this Court has entertained a direct appeal in an antitrust case only twice, both times involving AT&T's agreed divestiture of its local telephone companies. *California* v. *United States*, 464 U.S. 1013 (1983); *Maryland* v. *United States*, 460 U.S. 1001 (1983). The *AT&T* appeals illustrate the very limited circumstances in which direct appeal to this Court is appropriate.

After approving the divestiture plan, the district court in the *AT&T* case permitted numerous objecting parties to intervene for purposes of appeal. Several intervenors as well as the DOJ moved the district court to certify the case for direct appeal to this Court, and AT&T and nearly all of the remaining intervenors supported certification. In certifying the case, the district court stated that immediate consideration by this

Court was necessary because the decree (which was not stayed pending appeal) required AT&T to divest its local telephone companies in 15 months and extensive preparations were already under way. *United States* v. *Western Elec. Co.*, No. 82-0192, 1982 WL 1931, at *1-2 (D.D.C. Nov. 10, 1982). The district court also stressed that the appeals raised "a relatively narrow range of questions," *id.* at *2 n.7a, and that those questions were "of significant importance to the administration of justice" because they called into question the powers of district courts under the Tunney Act, 15 U.S.C. § 16(b)-(h). *Id.* at *2. Lastly, the district court noted that representatives of various States and local utility commissions had stated that they intended to seek injunctive relief in their local federal courts, interfering with the settlement and potentially creating conflicts among federal courts that only immediate review by this Court could prevent. *Id.* In *Maryland*, this Court summarily affirmed the district court's judgment without opinion over three dissents; in *California*, it again summarily affirmed the district court's approval of the divestiture plan without opinion.

The *AT&T* appeals are readily distinguishable from the instant appeals in three important respects. First, because *AT&T* involved a negotiated consent decree, there were no findings of fact or trial record to be reviewed. *Maryland*, 460 U.S. at 1002 (Rehnquist, J., dissenting). Second, the *AT&T* appeals raised narrow legal questions of significant importance to the administration of justice that this Court could—and did—resolve summarily. Third, both the DOJ and AT&T supported immediate consideration of the appeals by this Court. These appeals, in contrast, are a morass of procedural and substantive issues that can be resolved only through a painstaking review of a lengthy and technologically complex trial record.

The many issues raised by these appeals are likely to necessitate oversized briefs and appendices and extended oral argument. Indeed, were this Court to hear argument this winter, it might well not render a decision until October

Term 2001. Prior to 1974, when this Court's jurisdiction under the Expediting Act was mandatory, appeals in civil antitrust cases brought by the United States that were not disposed of summarily were routinely carried over to the following term.[5] As Justice Clark observed in *Brown Shoe*, where more than two years passed before this Court's decision, direct appeals pursuant to the Expediting Act "seldom result[] in much expedition." 370 U.S. at 355 (Clark, J., concurring); *see also id.* at 364 ("And under modern conditions it may well be doubted whether direct review of such cases by this Court truly serves the purpose of expedition which underlay the original passage of the Expediting Act.") (Harlan, J., dissenting in part and concurring in part).

Microsoft's appeal in the States' separately-filed action is an added complicating factor and further reason to remand the appeal in the DOJ's action. By its terms, the Expediting Act confers jurisdiction on this Court to hear direct appeals only in civil antitrust actions "in which the United States is the complainant." 15 U.S.C. § 29(a). The United States is not *the* complainant—indeed, not even *a* complainant—in the States' action. Consolidation "does not merge the suits into a single cause or change the rights of the parties, or make those who are parties in one suit parties in another." *Johnson* v. *Manhattan Ry. Co.*, 289 U.S. 479, 496-97 (1933); *see also* 9 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2382, at 430 (1995). Each consolidated case "must be considered separately to determine whether or not this Court has jurisdiction to consider its merits." *Butler* v. *Dexter*, 425 U.S. 262, 267 n.12 (1976). As a result, accepting direct appeal of the DOJ's action would mean that, contrary to the goals of the Expediting Act,

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[5] *See, e.g., United States* v. *General Dynamics Corp.*, 415 U.S. 486 (1974); *United States* v. *Grinnell Corp.*, 384 U.S. 563 (1966); *Northern Pac. Ry. Co.* v. *United States*, 356 U.S. 1 (1958); *United States* v. *National Lead Co.*, 332 U.S. 319 (1947).

Microsoft's two appeals would proceed in separate courts, thus delaying ultimate resolution of the two cases.[6]

Arrayed against these compelling considerations favoring remand, neither the district court nor appellees have advanced any special circumstance that requires these appeals to be heard first by this Court. These two actions have already been pending for over two years, and the district court identified no specific harm that will result from the lack of immediate consideration by this Court. In fact, over appellees' objection, the district court itself stayed all relief pending appellate review.

V. The Administration of Justice Would Be Best Served by Allowing These Appeals To Proceed Along the Normal Route to the Court of Appeals.

The severity of the remedy imposed and the significance of these cases to the Nation's economy make it more important—not less—that these appeals proceed through intermediate appellate review in the normal course. As this Court has recognized, district court decisions in antitrust actions require particularly close appellate scrutiny. *United States* v. *E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 325 (1961); *International Boxing Club* v. *United States*, 358 U.S. 242, 253 (1959). "[I]n suits under the Sherman Act, it is unthinkable that Congress has entrusted the enforcement of a statute of such far-reaching importance to the judgment of a single judge," without careful and deliberate appellate review. *Hartford-Empire Co.* v. *United States*, 324 U.S. 570, 571

[6] The States have announced that they intend to file a petition for writ of certiorari before judgment pursuant to 28 U.S.C. §§ 1254(1) and 2101(e), but they have not yet done so. Rule 11 provides that such a petition "will be granted only upon a showing that the case is of such imperative public importance as to justify a deviation from normal appellate practice and to require immediate determination in this Court." This Court has granted certiorari before judgment only "in cases of great constitutional significance and of extraordinary national importance for other reasons." ROBERT L. STERN, ET AL., *supra* § 4.20, at 199. Microsoft's appeal in the States' case does not satisfy that demanding standard.

(1945). Here, there is no reason to skip what this Court has recognized as a crucial step in the appellate process. *See Ford Motor Co.*, 405 U.S. at 595 n.5 (Burger, C.J., concurring in part and dissenting in part).

In fact, many of the issues presented by these appeals are particularly well-suited for review by the court of appeals. Review of procedural, evidentiary and factual issues is the normal province of the court of appeals. This Court generally does not address issues that are intensely fact-bound and that do not raise general and recurring questions of federal law on which authoritative pronouncements are required. In addition, the court of appeals has already spoken on a central issue in these cases—the standard applicable to claims of technological tying—and should be given the first opportunity to review the district court's decision on that issue.

The court of appeals also should be given an opportunity to address the propriety of the district court's extrajudicial discussions with the press about the merits of these cases. *United States* v. *Cooley*, 1 F.3d 985, 995 (10th Cir. 1993) (district judge disqualified because of comments made during appearance on television program "Nightline"). The court of appeals has already admonished the district court once for airing its views on a pending case outside of a judicial forum. *See In re Barry*, 946 F.2d 913, 914 (D.C. Cir. 1991); *see also id.* at 917 (Edwards, J., dissenting) ("[T]he Canon is clear in indicating that a judge *never may discuss the merits of a pending case in a non-judicial forum, especially when he has reason to know that the parties to the litigation may appear before him again for further judgment in the case.*") (emphasis in original). This Court has also recognized that "supervisory control of the District Courts by the Courts of Appeals is necessary to proper judicial administration in the federal system." *La Buy* v. *Howes Leather Co.*, 352 U.S. 249, 259-60 (1957).

If these appeals can be decided by the court of appeals on narrow, case-specific grounds, this Court may never need to review these cases. But even if important issues of law

remain after the court of appeals' decision, this Court would still benefit from the court of appeals' analysis of them. The court of appeals' orders providing that these appeals will be heard *en banc* have eliminated one step in the process—a petition for rehearing *en banc*. The prompt manner in which the court of appeals entered those orders makes plain that it appreciates the importance of these cases and will act as expeditiously as is consistent with appropriate deliberation.

Whatever time, if any, might be saved by immediate review here is outweighed by the benefits to this Court, the parties and the administration of justice of ensuring comprehensive and careful review of the decision below. As Justice Frankfurter once observed, "Wise adjudication has its own time for ripening." *Maryland* v. *Baltimore Radio Show, Inc.*, 338 U.S. 912, 918 (1950) (Frankfurter, J., respecting denial of certiorari). The importance of these cases will not lie in how quickly they are resolved, but in their long-term effects on consumers and this Nation's economy. Allowing these appeals to proceed along the normal route to the court of appeals will best serve those interests.

Conclusion

This Court should deny these direct appeals and remand the cases to the court of appeals.

Respectfully submitted,

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July 26, 2000

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OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

MICROSOFT CORPORATION,

Appellant,

—v.—

UNITED STATES OF AMERICA and STATE OF NEW YORK, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

APPENDIX TO JURISDICTIONAL STATEMENT

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. MICROSOFT CORPORATION, Defendant.	Civil Action No. 98-1232 (TPJ)
STATE OF NEW YORK, *et al.*, Plaintiffs, v. MICROSOFT CORPORATION, Defendant.	Civil Action No. 98-1233 (TPJ)
MICROSOFT CORPORATION, Counterclaim-Plaintiff, v. ELIOT SPITZER, attorney general of the State of New York, in his official capacity, *et al.*, Counterclaim-Defendants.	

Filed Apr 3 - 2000
Nancy Mayer
Whittington, Clerk
U.S. District Court

CONCLUSIONS OF LAW

The United States, nineteen individual states, and the District of Columbia ("the plaintiffs") bring these consolidated civil enforcement actions against defendant Microsoft Corporation ("Microsoft") under the Sherman Antitrust Act, 15 U.S.C. §§ 1 and 2. The plaintiffs charge, in essence, that Microsoft has waged an unlawful campaign in defense of its monopoly position in the market for operating systems designed to run on Intel-compatible personal computers ("PCs"). Specifically, the plaintiffs contend that Microsoft violated § 2 of the Sherman Act by engaging in a

series of exclusionary, anticompetitive, and predatory acts to maintain its monopoly power. They also assert that Microsoft attempted, albeit unsuccessfully to date, to monopolize the Web browser market, likewise in violation of § 2. Finally, they contend that certain steps taken by Microsoft as part of its campaign to protect its monopoly power, namely tying its browser to its operating system and entering into exclusive dealing arrangements, violated § 1 of the Act.

Upon consideration of the Court's Findings of Fact ("Findings"), filed herein on November 5, 1999, as amended on December 21, 1999, the proposed conclusions of law submitted by the parties, the briefs of *amici curiae*, and the argument of counsel thereon, the Court concludes that Microsoft maintained its monopoly power by anticompetitive means and attempted to monopolize the Web browser market, both in violation of § 2. Microsoft also violated § 1 of the Sherman Act by unlawfully tying its Web browser to its operating system. The facts found do not support the conclusion, however, that the effect of Microsoft's marketing arrangements with other companies constituted unlawful exclusive dealing under criteria established by leading decisions under § 1.

The nineteen states and the District of Columbia ("the plaintiff states") seek to ground liability additionally under their respective antitrust laws. The Court is persuaded that the evidence in the record proving violations of the Sherman Act also satisfies the elements of analogous causes of action arising under the laws of each plaintiff state. For this reason, and for others stated below, the Court holds Microsoft liable under those particular state laws as well.

I. SECTION TWO OF THE SHERMAN ACT

A. Maintenance of Monopoly Power by Anticompetitive Means

Section 2 of the Sherman Act declares that it is unlawful for a person or firm to "monopolize . . . any part of the trade or commerce among the several States, or with foreign nations . . . ." 15 U.S.C. § 2. This language operates to limit the means by which a firm may lawfully either acquire or perpetuate monopoly power. Specifically, a firm violates § 2 if it attains or preserves monopoly power through anticompetitive acts. *See United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966) ("The offense of monopoly power under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."); *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 488 (1992) (Scalia, J., dissenting) ("Our § 2 monopolization doctrines are . . . directed to discrete situations in which a defendant's possession of substantial market power, combined with his exclusionary or anticompetitive behavior, threatens to defeat or forestall the corrective forces of competition and thereby sustain or extend the defendant's agglomeration of power.").

1. Monopoly Power

The threshold element of a § 2 monopolization offense being "the possession of monopoly power in the relevant market," *Grinnell*, 384 U.S. at 570, the Court must first ascertain the boundaries of the commercial activity that can be termed the "relevant market." *See Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172, 177 (1965) ("Without a definition of [the relevant] market there is no way to measure [defendant's] ability to lessen or destroy competition."). Next, the Court must assess the

defendant's actual power to control prices in—or to exclude competition from—that market. *See United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956) ("Monopoly power is the power to control prices or exclude competition.").

In this case, the plaintiffs postulated the relevant market as being the worldwide licensing of Intel-compatible PC operating systems. Whether this zone of commercial activity actually qualifies as a market, "monopolization of which may be illegal," depends on whether it includes all products "reasonably interchangeable by consumers for the same purposes." *du Pont*, 351 U.S. at 395. *SeeRothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 218 (D.C. Cir. 1986) ("Because the ability of consumers to turn to other suppliers restrains a firm from raising prices above the competitive level, the definition of the 'relevant market' rests on a determination of available substitutes.").

The Court has already found, based on the evidence in this record, that there are currently no products—and that there are not likely to be any in the near future—that a significant percentage of computer users worldwide could substitute for Intel-compatible PC operating systems without incurring substantial costs. Findings ¶¶ 18-29. The Court has further found that no firm not currently marketing Intel-compatible PC operating systems could start doing so in a way that would, within a reasonably short period of time, present a significant percentage of such consumers with a viable alternative to existing Intel-compatible PC operating systems. *Id.* ¶¶ 18, 30-32. From these facts, the Court has inferred that if a single firm or cartel controlled the licensing of all Intel-compatible PC operating systems worldwide, it could set the price of a license substantially above that which would be charged in a competitive market—and leave the price there for a significant period of time—without losing so many customers as to make the action unprofitable. *Id.* ¶ 18. This inference, in turn, has led the Court to find that the

licensing of all Intel-compatible PC operating systems worldwide does in fact constitute the relevant market in the context of the plaintiffs' monopoly maintenance claim. *Id.*

The plaintiffs proved at trial that Microsoft possesses a dominant, persistent, and increasing share of the relevant market. Microsoft's share of the worldwide market for Intel-compatible PC operating systems currently exceeds ninety-five percent, and the firm's share would stand well above eighty percent even if the Mac OS were included in the market. *Id.* ¶ 35. The plaintiffs also proved that the applications barrier to entry protects Microsoft's dominant market share. *Id.* ¶¶ 36-52. This barrier ensures that no Intel-compatible PC operating system other than Windows can attract significant consumer demand, and the barrier would operate to the same effect even if Microsoft held its prices substantially above the competitive level for a protracted period of time. *Id.* Together, the proof of dominant market share and the existence of a substantial barrier to effective entry create the presumption that Microsoft enjoys monopoly power. *See United States v. AT&T Co.*, 524 F. Supp. 1336, 1347-48 (D.D.C. 1981) ("a persuasive showing . . . that defendants have monopoly power . . . through various barriers to entry, . . . in combination with the evidence of market shares, suffice[s] at least to meet the government's initial burden, and the burden is then appropriately placed upon defendants to rebut the existence and significance of barriers to entry"), *quoted with approval in Southern Pac. Communications Co. v. AT&T Co.*, 740 F.2d 980, 1001-02 (D.C. Cir. 1984).

At trial, Microsoft attempted to rebut the presumption of monopoly power with evidence of both putative constraints on its ability to exercise such power and behavior of its own that is supposedly inconsistent with the possession of monopoly power. None of the purported constraints, however, actually deprive Microsoft of "the ability (1) to price substantially above the competitive level *and* (2) to

persist in doing so for a significant period without erosion by new entry or expansion." IIA Phillip E. Areeda, Herbert Hovenkamp & John L. Solow, *Antitrust Law* ¶ 501, at 86 (1995) (emphasis in original); *see* Findings ¶¶ 57-60. Furthermore, neither Microsoft's efforts at technical innovation nor its pricing behavior is inconsistent with the possession of monopoly power. *Id.* ¶¶ 61-66.

Even if Microsoft's rebuttal had attenuated the presumption created by the *prima facie* showing of monopoly power, corroborative evidence of monopoly power abounds in this record: Neither Microsoft nor its OEM customers believe that the latter have—or will have anytime soon—even a single, commercially viable alternative to licensing Windows for pre-installation on their PCs. *Id.* ¶¶ 53-55; *cf. Rothery*, 792 F.2d at 219 n.4 ("we assume that economic actors usually have accurate perceptions of economic realities"). Moreover, over the past several years, Microsoft has comported itself in a way that could only be consistent with rational behavior for a profit-maximizing firm if the firm knew that it possessed monopoly power, and if it was motivated by a desire to preserve the barrier to entry protecting that power. Findings ¶¶ 67, 99, 136, 141, 215-16, 241, 261-62, 286, 291, 330, 355, 393, 407.

In short, the proof of Microsoft's dominant, persistent market share protected by a substantial barrier to entry, together with Microsoft's failure to rebut that *prima facie* showing effectively and the additional indicia of monopoly power, have compelled the Court to find as fact that Microsoft enjoys monopoly power in the relevant market. *Id.* ¶ 33.

2. Maintenance of Monopoly Power by Anticompetitive Means

In a § 2 case, once it is proved that the defendant possesses monopoly power in a relevant market, liability for monopolization depends on a showing that the defendant

used anticompetitive methods to achieve or maintain its position. *See United States v. Grinnell*, 384 U.S. 563, 570-71 (1966); *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 488 (1992) (Scalia, J., dissenting); *Intergraph Corp. v. Intel Corp.*, 195 F.3d 1346, 1353 (Fed. Cir. 1999). Prior cases have established an analytical approach to determining whether challenged conduct should be deemed anticompetitive in the context of a monopoly maintenance claim. The threshold question in this analysis is whether the defendant's conduct is "exclusionary"—that is, whether it has restricted significantly, or threatens to restrict significantly, the ability of other firms to compete in the relevant market on the merits of what they offer customers. *See Eastman Kodak*, 504 U.S. at 488 (Scalia, J., dissenting) (§ 2 is "directed to discrete situations" in which the behavior of firms with monopoly power "threatens to defeat or forestall the corrective forces of competition").[1]

If the evidence reveals a significant exclusionary impact in the relevant market, the defendant's conduct will be labeled "anticompetitive"—and liability will attach—unless the defendant comes forward with specific, procompetitive business motivations that explain the full extent of its exclusionary conduct. *See Eastman Kodak*, 504 U.S. at 483 (declining to grant defendant's motion for summary judgment because factual questions remained as to whether defendant's asserted justifications were sufficient to explain the exclusionary conduct or were instead merely pretextual); *see also Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 n.32 (1985) (holding that the second element of a monopoly maintenance claim is

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[1] Proof that the defendant's conduct was motivated by a desire to prevent other firms from competing on the merits can contribute to a finding that the conduct has had, or will have, the intended, exclusionary effect. *See United States v. United States Gypsum Co.*, 438 U.S. 422, 436 n.13 (1978) ("consideration of intent may play an important role in divining the actual nature and effect of the alleged anticompetitive conduct").

satisfied by proof of "'behavior that not only (1) tends to impair the opportunities of rivals, but also (2) either does not further competition on the merits or does so in an unnecessarily restrictive way'") (quoting III Phillip E. Areeda & Donald F. Turner, *Antitrust Law* ¶ 626b, at 78 (1978)).

If the defendant with monopoly power consciously antagonized its customers by making its products less attractive to them—or if it incurred other costs, such as large outlays of development capital and forfeited opportunities to derive revenue from it—with no prospect of compensation other than the erection or preservation of barriers against competition by equally efficient firms, the Court may deem the defendant's conduct "predatory." As the D.C. Circuit stated in *Neumann v. Reinforced Earth Co.*,

> [P]redation involves aggression against business rivals through the use of business practices that would not be considered profit maximizing except for the expectation that (1) actual rivals will be driven from the market, or the entry of potential rivals blocked or delayed, so that the predator will gain or retain a market share sufficient to command monopoly profits, or (2) rivals will be chastened sufficiently to abandon competitive behavior the predator finds threatening to its realization of monopoly profits.

786 F.2d 424, 427 (D.C. Cir. 1986).

Proof that a profit-maximizing firm took predatory action should suffice to demonstrate the threat of substantial exclusionary effect; to hold otherwise would be to ascribe irrational behavior to the defendant. Moreover, predatory conduct, by definition as well as by nature, lacks procompetitive business motivation. *See Aspen Skiing*, 472 U.S. at 610-11 (evidence indicating that defendant's conduct

was "motivated entirely by a decision to avoid providing any benefits" to a rival supported the inference that defendant's conduct "was not motivated by efficiency concerns"). In other words, predatory behavior is patently anticompetitive. Proof that a firm with monopoly power engaged in such behavior thus necessitates a finding of liability under § 2.

In this case, Microsoft early on recognized middleware as the Trojan horse that, once having, in effect, infiltrated the applications barrier, could enable rival operating systems to enter the market for Intel-compatible PC operating systems unimpeded. Simply put, middleware threatened to demolish Microsoft's coveted monopoly power. Alerted to the threat, Microsoft strove over a period of approximately four years to prevent middleware technologies from fostering the development of enough full-featured, cross-platform applications to erode the applications barrier. In pursuit of this goal, Microsoft sought to convince developers to concentrate on Windows-specific APIs and ignore interfaces exposed by the two incarnations of middleware that posed the greatest threat, namely, Netscape's Navigator Web browser and Sun's implementation of the Java technology. Microsoft's campaign succeeded in preventing—for several years, and perhaps permanently—Navigator and Java from fulfilling their potential to open the market for Intel-compatible PC operating systems to competition on the merits. Findings ¶¶ 133, 378. Because Microsoft achieved this result through exclusionary acts that lacked procompetitive justification, the Court deems Microsoft's conduct the maintenance of monopoly power by anticompetitive means.

a. Combating the Browser Threat

The same ambition that inspired Microsoft's efforts to induce Intel, Apple, RealNetworks and IBM to desist from certain technological innovations and business initiatives—namely, the desire to preserve the applications barrier—motivated the firm's June 1995 proposal that Netscape

abstain from releasing platform-level browsing software for 32-bit versions of Windows. *See id.* ¶¶ 79-80, 93-132. This proposal, together with the punitive measures that Microsoft inflicted on Netscape when it rebuffed the overture, illuminates the context in which Microsoft's subsequent behavior toward PC manufacturers ("OEMs"), Internet access providers ("IAPs"), and other firms must be viewed.

When Netscape refused to abandon its efforts to develop Navigator into a substantial platform for applications development, Microsoft focused its efforts on minimizing the extent to which developers would avail themselves of interfaces exposed by that nascent platform. Microsoft realized that the extent of developers' reliance on Netscape's browser platform would depend largely on the size and trajectory of Navigator's share of browser usage. Microsoft thus set out to maximize Internet Explorer's share of browser usage at Navigator's expense. *Id.* ¶¶ 133, 359-61. The core of this strategy was ensuring that the firms comprising the most effective channels for the generation of browser usage would devote their distributional and promotional efforts to Internet Explorer rather than Navigator. Recognizing that pre-installation by OEMs and bundling with the proprietary software of IAPs led more directly and efficiently to browser usage than any other practices in the industry, Microsoft devoted major efforts to usurping those two channels. *Id.* ¶ 143.

i. The OEM Channel

With respect to OEMs, Microsoft's campaign proceeded on three fronts. First, Microsoft bound Internet Explorer to Windows with contractual and, later, technological shackles in order to ensure the prominent (and ultimately permanent) presence of Internet Explorer on every Windows user's PC system, and to increase the costs attendant to installing and using Navigator on any PCs running Windows. *Id.* ¶¶ 155-74. Second, Microsoft imposed stringent limits on the freedom of OEMs to reconfigure or

modify Windows 95 and Windows 98 in ways that might enable OEMs to generate usage for Navigator in spite of the contractual and technological devices that Microsoft had employed to bind Internet Explorer to Windows. *Id.* ¶¶ 202-29. Finally, Microsoft used incentives and threats to induce especially important OEMs to design their distributional, promotional and technical efforts to favor Internet Explorer to the exclusion of Navigator. *Id.* ¶¶ 230-38.

Microsoft's actions increased the likelihood that pre-installation of Navigator onto Windows would cause user confusion and system degradation, and therefore lead to higher support costs and reduced sales for the OEMs. *Id.* ¶¶ 159, 172. Not willing to take actions that would jeopardize their already slender profit margins, OEMs felt compelled by Microsoft's actions to reduce drastically their distribution and promotion of Navigator. *Id.* ¶¶ 239, 241. The substantial inducements that Microsoft held out to the largest OEMs only further reduced the distribution and promotion of Navigator in the OEM channel. *Id.* ¶¶ 230, 233. The response of OEMs to Microsoft's efforts had a dramatic, negative impact on Navigator's usage share. *Id.* ¶ 376. The drop in usage share, in turn, has prevented Navigator from being the vehicle to open the relevant market to competition on the merits. *Id.* ¶¶ 377-78, 383.

Microsoft fails to advance any legitimate business objectives that actually explain the full extent of this significant exclusionary impact. The Court has already found that no quality-related or technical justifications fully explain Microsoft's refusal to license Windows 95 to OEMs without version 1.0 through 4.0 of Internet Explorer, or its refusal to permit them to uninstall versions 3.0 and 4.0. *Id.* ¶¶ 175-76. The same lack of justification applies to Microsoft's decision not to offer a browserless version of Windows 98 to consumers and OEMs, *id.* ¶ 177, as well as to its claim that it could offer "best of breed" implementations of functionalities in Web browsers. With respect to the latter

assertion, Internet Explorer is not demonstrably the current "best of breed" Web browser, nor is it likely to be so at any time in the immediate future. The fact that Microsoft itself was aware of this reality only further strengthens the conclusion that Microsoft's decision to tie Internet Explorer to Windows cannot truly be explained as an attempt to benefit consumers and improve the efficiency of the software market generally, but rather as part of a larger campaign to quash innovation that threatened its monopoly position. *Id.* ¶¶ 195, 198.

To the extent that Microsoft still asserts a copyright defense, relying upon federal copyright law as a justification for its various restrictions on OEMs, that defense neither explains nor operates to immunize Microsoft's conduct under the Sherman Act. As a general proposition, Microsoft argues that the federal Copyright Act, 17 U.S.C. § 101 *et seq.*, endows the holder of a valid copyright in software with an absolute right to prevent licensees, in this case the OEMs, from shipping modified versions of its product without its express permission. In truth, Windows 95 and Windows 98 are covered by copyright registrations, Findings ¶ 228, that "constitute *prima facie* evidence of the validity of the copyright." 17 U.S.C. § 410(c). But the *validity* of Microsoft's copyrights has never been in doubt; the issue is what, precisely, they protect.

Microsoft has presented no evidence that the contractual (or the technological) restrictions it placed on OEMs' ability to alter Windows derive from any of the enumerated rights explicitly granted to a copyright holder under the Copyright Act. Instead, Microsoft argues that the restrictions "simply restate" an expansive right to preserve the "integrity"of its copyrighted software against any "distortion," "truncation," or "alteration," a right nowhere mentioned among the Copyright Act's list of exclusive rights, 17 U.S.C. § 106, thus raising some doubt as to its existence. *See Twentieth Century Music Corp. v. Aiken*, 422

U.S. 151, 155 (1973) (not all uses of a work are within copyright holder's control; rights limited to specifically granted "exclusive rights"); *cf.* 17 U.S.C. § 501(a) (infringement means violating specifically enumerated rights).[2]

It is also well settled that a copyright holder is not by reason thereof entitled to employ the perquisites in ways that directly threaten competition. *See, e.g., Eastman Kodak*, 504 U.S. at 479 n.29 ("The Court has held many times that power gained through some natural and legal advantage such as a . . . copyright, . . . can give rise to liability if 'a seller exploits his dominant position in one market to expand his empire into the next.'") (quoting *Times-Picayune Pub. Co. v. United States*, 345 U.S. 594, 611 (1953)); *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 421 (1986); *Data General Corp. v. Grumman Systems Support Corp.*, 36 F.3d 1147, 1186 n.63 (1st Cir. 1994) (a copyright does not exempt its holder from antitrust inquiry where the copyright is used as part of a scheme to monopolize); *see also Image Technical Services, Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1219 (9th Cir. 1997), *cert. denied*, 523 U.S. 1094 (1998) ("Neither the aims of intellectual property law, nor the antitrust laws justify allowing a monopolist to rely upon a pretextual business justification to mask anticompetitive conduct."). Even constitutional privileges confer no immunity when they are abused for anticompetitive purposes. *See Lorain Journal Co. v. United States*, 342 U.S. 143, 155-56 (1951). The Court has already found that the true impetus behind Microsoft's restrictions on OEMs was

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[2] While Microsoft is correct that some courts have also recognized the right of a copyright holder to preserve the "integrity" of artistic works in addition to those rights enumerated in the Copyright Act, the Court nevertheless concludes that those cases, being actions for infringement without antitrust implications, are inapposite to the one currently before it. *See, e.g., WGN Continental Broadcasting Co. v. United Video, Inc.*, 693 F.2d 622 (7th Cir. 1982); *Gilliam v. ABC, Inc.*, 538 F.2d 14 (2d Cir. 1976).

not its desire to maintain a somewhat amorphous quality it refers to as the "integrity" of the Windows platform, nor even to ensure that Windows afforded a uniform and stable platform for applications development. Microsoft itself engendered, or at least countenanced, instability and inconsistency by permitting Microsoft-friendly modifications to the desktop and boot sequence, and by releasing updates to Internet Explorer more frequently than it released new versions of Windows. Findings ¶ 226. Add to this the fact that the modifications OEMs desired to make would not have removed or altered any Windows APIs, and thus would not have disrupted any of Windows' functionalities, and it is apparent that Microsoft's conduct is effectively explained by its foreboding that OEMs would pre-install and give prominent placement to middleware like Navigator that could attract enough developer attention to weaken the applications barrier to entry. *Id.* ¶ 227. In short, if Microsoft was truly inspired by a genuine concern for maximizing consumer satisfaction, as well as preserving its substantial investment in a worthy product, then it would have relied more on the power of the very competitive PC market, and less on its own market power, to prevent OEMs from making modifications that consumers did not want. *Id.* ¶¶ 225, 228-29.

ii. The IAP Channel

Microsoft adopted similarly aggressive measures to ensure that the IAP channel would generate browser usage share for Internet Explorer rather than Navigator. To begin with, Microsoft licensed Internet Explorer and the Internet Explorer Access Kit to hundreds of IAPs for no charge. *Id.* ¶¶ 250-51. Then, Microsoft extended valuable promotional treatment to the ten most important IAPs in exchange for their commitment to promote and distribute Internet Explorer and to exile Navigator from the desktop. *Id.* ¶¶ 255-58, 261, 272, 288-90, 305-06. Finally, in exchange for efforts to upgrade existing subscribers to client software that came

bundled with Internet Explorer instead of Navigator, Microsoft granted rebates—and in some cases made outright payments—to those same IAPs. *Id.* ¶¶ 259-60, 295. Given the importance of the IAP channel to browser usage share, it is fair to conclude that these inducements and restrictions contributed significantly to the drastic changes that have in fact occurred in Internet Explorer's and Navigator's respective usage shares. *Id.* ¶¶ 144-47, 309-10. Microsoft's actions in the IAP channel thereby contributed significantly to preserving the applications barrier to entry.

There are no valid reasons to justify the full extent of Microsoft's exclusionary behavior in the IAP channel. A desire to limit free riding on the firm's investment in consumer-oriented features, such as the Referral Server and the Online Services Folder, can, in some circumstances, qualify as a procompetitive business motivation; but that motivation does not explain the full extent of the restrictions that Microsoft actually imposed upon IAPs. Under the terms of the agreements, an IAP's failure to keep Navigator shipments below the specified percentage primed Microsoft's contractual right to dismiss the IAP from its own favored position in the Referral Server or the Online Services Folder. This was true even if the IAP had refrained from promoting Navigator in its client software included with Windows, had purged all mention of Navigator from any Web site directly connected to the Referral Server, and had distributed no browser other than Internet Explorer to the new subscribers it gleaned from the Windows desktop. *Id.* ¶¶ 258, 262, 289. Thus, Microsoft's restrictions closed off a substantial amount of distribution that would not have constituted a free ride to Navigator.

Nor can an ostensibly procompetitive desire to "foster brand association" explain the full extent of Microsoft's restrictions. If Microsoft's only concern had been brand association, restrictions on the ability of IAPs to promote Navigator likely would have sufficed. It is doubtful that

Microsoft would have paid IAPs to induce their existing subscribers to drop Navigator in favor of Internet Explorer unless it was motivated by a desire to extinguish Navigator as a threat. *See id.* ¶¶ 259, 295. More generally, it is crucial to an understanding of Microsoft's intentions to recognize that Microsoft paid for the fealty of IAPs with large investments in software development for their benefit, conceded opportunities to take a profit, suffered competitive disadvantage to Microsoft's own OLS, and gave outright bounties. *Id.* ¶¶ 259-60, 277, 284-86, 295. Considering that Microsoft never intended to derive appreciable revenue from Internet Explorer directly, *id.* ¶¶ 136-37, these sacrifices could only have represented rational business judgments to the extent that they promised to diminish Navigator's share of browser usage and thereby contribute significantly to eliminating a threat to the applications barrier to entry. *Id.* ¶ 291. Because the full extent of Microsoft's exclusionary initiatives in the IAP channel can only be explained by the desire to hinder competition on the merits in the relevant market, those initiatives must be labeled anticompetitive.

In sum, the efforts Microsoft directed at OEMs and IAPs successfully ostracized Navigator as a practical matter from the two channels that lead most efficiently to browser usage. Even when viewed independently, these two prongs of Microsoft's campaign threatened to "forestall the corrective forces of competition" and thereby perpetuate Microsoft's monopoly power in the relevant market. *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 488 (1992) (Scalia, J., dissenting). Therefore, whether they are viewed separately or together, the OEM and IAP components of Microsoft's anticompetitive campaign merit a finding of liability under § 2.

iii. ICPs, ISVs and Apple

No other distribution channels for browsing software approach the efficiency of OEM pre-installation and IAP bundling. Findings ¶¶ 144-47. Nevertheless, protecting the

applications barrier to entry was so critical to Microsoft that the firm was willing to invest substantial resources to enlist ICPs, ISVs, and Apple in its campaign against the browser threat. By extracting from Apple terms that significantly diminished the usage of Navigator on the Mac OS, Microsoft helped to ensure that developers would not view Navigator as truly cross-platform middleware. *Id.* ¶ 356. By granting ICPs and ISVs free licenses to bundle Internet Explorer with their offerings, and by exchanging other valuable inducements for their agreement to distribute, promote and rely on Internet Explorer rather than Navigator, Microsoft directly induced developers to focus on its own APIs rather than ones exposed by Navigator. *Id.* ¶¶ 334-35, 340. These measures supplemented Microsoft's efforts in the OEM and IAP channels.

Just as they fail to account for the measures that Microsoft took in the IAP channel, the goals of preventing free riding and preserving brand association fail to explain the full extent of Microsoft's actions in the ICP channel. *Id.* ¶¶ 329-30. With respect to the ISV agreements, Microsoft has put forward no procompetitive business ends whatsoever to justify their exclusionary terms. *See id.* ¶¶ 339-40. Finally, Microsoft's willingness to make the sacrifices involved in cancelling Mac Office, and the concessions relating to browsing software that it demanded from Apple, can only be explained by Microsoft's desire to protect the applications barrier to entry from the threat posed by Navigator. *Id.* ¶ 355. Thus, once again, Microsoft is unable to justify the full extent of its restrictive behavior.

b. Combating the Java Threat

As part of its grand strategy to protect the applications barrier, Microsoft employed an array of tactics designed to maximize the difficulty with which applications written in Java could be ported from Windows to other platforms, and *vice versa*. The first of these measures was the creation of a Java implementation for Windows that undermined

portability and was incompatible with other implementations. *Id.* ¶¶ 387-93. Microsoft then induced developers to use its implementation of Java rather than Sun-compliant ones. It pursued this tactic directly, by means of subterfuge and barter, and indirectly, through its campaign to minimize Navigator's usage share. *Id.* ¶¶ 394, 396-97, 399-400, 401-03. In a separate effort to prevent the development of easily portable Java applications, Microsoft used its monopoly power to prevent firms such as Intel from aiding in the creation of cross-platform interfaces. *Id.* ¶¶ 404-06.

Microsoft's tactics induced many Java developers to write their applications using Microsoft's developer tools and to refrain from distributing Sun-compliant JVMs to Windows users. This stratagem has effectively resulted in fewer applications that are easily portable. *Id.* ¶ 398. What is more, Microsoft's actions interfered with the development of new cross-platform Java interfaces. *Id.* ¶ 406. It is not clear whether, absent Microsoft's machinations, Sun's Java efforts would by now have facilitated porting between Windows and other platforms to a degree sufficient to render the applications barrier to entry vulnerable. It is clear, however, that Microsoft's actions markedly impeded Java's progress to that end. *Id.* ¶ 407. The evidence thus compels the conclusion that Microsoft's actions with respect to Java have restricted significantly the ability of other firms to compete on the merits in the market for Intel-compatible PC operating systems.

Microsoft's actions to counter the Java threat went far beyond the development of an attractive alternative to Sun's implementation of the technology. Specifically, Microsoft successfully pressured Intel, which was dependent in many ways on Microsoft's good graces, to abstain from aiding in Sun's and Netscape's Java development work. *Id.* ¶¶ 396, 406. Microsoft also deliberately designed its Java development tools so that developers who were opting for portability over performance would nevertheless unwittingly

write Java applications that would run only on Windows. *Id.* ¶ 394. Moreover, Microsoft's means of luring developers to its Java implementation included maximizing Internet Explorer's share of browser usage at Navigator's expense in ways the Court has already held to be anticompetitive. *See supra*, § I.A.2.a. Finally, Microsoft impelled ISVs, which are dependent upon Microsoft for technical information and certifications relating to Windows, to use and distribute Microsoft's version of the Windows JVM rather than any Sun-compliant version. *Id.* ¶¶ 401-03.

These actions cannot be described as competition on the merits, and they did not benefit consumers. In fact, Microsoft's actions did not even benefit Microsoft in the short run, for the firm's efforts to create incompatibility between its JVM for Windows and others' JVMs for Windows resulted in fewer total applications being able to run on Windows than otherwise would have been written. Microsoft was willing nevertheless to obstruct the development of Windows-compatible applications if they would be easy to port to other platforms and would thus diminish the applications barrier to entry. *Id.* ¶ 407.

c. Microsoft's Conduct Taken As a Whole

As the foregoing discussion illustrates, Microsoft's campaign to protect the applications barrier from erosion by network-centric middleware can be broken down into discrete categories of activity, several of which on their own independently satisfy the second element of a § 2 monopoly maintenance claim. But only when the separate categories of conduct are viewed, as they should be, as a single, well-coordinated course of action does the full extent of the violence that Microsoft has done to the competitive process reveal itself. *See Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962) (counseling that in Sherman Act cases "plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the

various factual components and wiping the slate clean after scrutiny of each"). In essence, Microsoft mounted a deliberate assault upon entrepreneurial efforts that, left to rise or fall on their own merits, could well have enabled the introduction of competition into the market for Intel-compatible PC operating systems. *Id.* ¶ 411. While the evidence does not prove that they would have succeeded absent Microsoft's actions, it does reveal that Microsoft placed an oppressive thumb on the scale of competitive fortune, thereby effectively guaranteeing its continued dominance in the relevant market. More broadly, Microsoft's anticompetitive actions trammeled the competitive process through which the computer software industry generally stimulates innovation and conduces to the optimum benefit of consumers. *Id.* ¶ 412.

Viewing Microsoft's conduct as a whole also reinforces the conviction that it was predacious. Microsoft paid vast sums of money, and renounced many millions more in lost revenue every year, in order to induce firms to take actions that would help enhance Internet Explorer's share of browser usage at Navigator's expense. *Id.* ¶ 139. These outlays cannot be explained as subventions to maximize return from Internet Explorer. Microsoft has no intention of ever charging for licenses to use or distribute its browser. *Id.* ¶¶ 137-38. Moreover, neither the desire to bolster demand for Windows nor the prospect of ancillary revenues from Internet Explorer can explain the lengths to which Microsoft has gone. In fact, Microsoft has expended wealth and foresworn opportunities to realize more in a manner and to an extent that can only represent a rational investment if its purpose was to perpetuate the applications barrier to entry. *Id.* ¶¶ 136, 139-42. Because Microsoft's business practices "would not be considered profit maximizing except for the expectation that . . . the entry of potential rivals" into the market for Intel-compatible PC operating systems will be "blocked or delayed," *Neumann v. Reinforced Earth Co.*, 786 F.2d 424, 427 (D.C. Cir. 1986),

Microsoft's campaign must be termed predatory. Since the Court has already found that Microsoft possesses monopoly power, *see supra*, § I.A.1, the predatory nature of the firm's conduct compels the Court to hold Microsoft liable under § 2 of the Sherman Act.

B. Attempting to Obtain Monopoly Power in a Second Market by Anticompetitive Means

In addition to condemning actual monopolization, § 2 of the Sherman Act declares that it is unlawful for a person or firm to "attempt to monopolize . . . any part of the trade or commerce among the several States, or with foreign nations . . . ." 15 U.S.C. § 2. Relying on this language, the plaintiffs assert that Microsoft's anticompetitive efforts to maintain its monopoly power in the market for Intel-compatible PC operating systems warrant additional liability as an illegal attempt to amass monopoly power in "the browser market." The Court agrees.

In order for liability to attach for attempted monopolization, a plaintiff generally must prove "(1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize," and (3) that there is a "dangerous probability" that the defendant will succeed in achieving monopoly power. *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993). Microsoft's June 1995 proposal that Netscape abandon the field to Microsoft in the market for browsing technology for Windows, and its subsequent, well-documented efforts to overwhelm Navigator's browser usage share with a proliferation of Internet Explorer browsers inextricably attached to Windows, clearly meet the first element of the offense.

The evidence in this record also satisfies the requirement of specific intent. Microsoft's effort to convince Netscape to stop developing platform-level browsing software for the 32-bit versions of Windows was made with

full knowledge that Netscape's acquiescence in this market allocation scheme would, without more, have left Internet Explorer with such a large share of browser usage as to endow Microsoft with *de facto* monopoly power in the browser market. Findings ¶¶ 79-89.

When Netscape refused to abandon the development of browsing software for 32-bit versions of Windows, Microsoft's strategy for protecting the applications barrier became one of expanding Internet Explorer's share of browser usage—and simultaneously depressing Navigator's share—to an extent sufficient to demonstrate to developers that Navigator would never emerge as the standard software employed to browse the Web. *Id.* ¶ 133. While Microsoft's top executives never expressly declared acquisition of monopoly power in the browser market to be the objective, they knew, or should have known, that the tactics they actually employed were likely to push Internet Explorer's share to those extreme heights. Navigator's slow demise would leave a competitive vacuum for only Internet Explorer to fill. Yet, there is no evidence that Microsoft tried—or even considered trying—to prevent its anticompetitive campaign from achieving overkill. Under these circumstances, it is fair to presume that the wrongdoer intended "the probable consequences of its acts." IIIA Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 805b, at 324 (1996); *see also Spectrum Sports*, 506 U.S. at 459 (proof of "'predatory' tactics . . . may be sufficient to prove the necessary intent to monopolize, which is something more than an intent to compete vigorously"). Therefore, the facts of this case suffice to prove the element of specific intent.

Even if the first two elements of the offense are met, however, a defendant may not be held liable for attempted monopolization absent proof that its anticompetitive conduct created a dangerous probability of achieving the objective of monopoly power in a relevant market. *Id.* The evidence

supports the conclusion that Microsoft's actions did pose such a danger.

At the time Microsoft presented its market allocation proposal to Netscape, Navigator's share of browser usage stood well above seventy percent, and no other browser enjoyed more than a fraction of the remainder. Findings ¶¶ 89, 372. Had Netscape accepted Microsoft's offer, nearly all of its share would have devolved upon Microsoft, because at that point, no potential third-party competitor could either claim to rival Netscape's stature as a browser company or match Microsoft's ability to leverage monopoly power in the market for Intel-compatible PC operating systems. In the time it would have taken an aspiring entrant to launch a serious effort to compete against Internet Explorer, Microsoft could have erected the same type of barrier that protects its existing monopoly power by adding proprietary extensions to the browsing software under its control and by extracting commitments from OEMs, IAPs and others similar to the ones discussed in § I.A.2, *supra*. In short, Netscape's assent to Microsoft's market division proposal would have, *instanter*, resulted in Microsoft's attainment of monopoly power in a second market. It follows that the proposal itself created a dangerous probability of that result. *See United States v. American Airlines, Inc.*, 743 F.2d 1114, 1118-19 (5th Cir. 1984) (fact that two executives "arguably" could have implemented market-allocation scheme that would have engendered monopoly power was sufficient for finding of dangerous probability). Although the dangerous probability was no longer imminent with Netscape's rejection of Microsoft's proposal, "the probability of success at the time the acts occur" is the measure by which liability is determined. *Id.* at 1118.

This conclusion alone is sufficient to support a finding of liability for attempted monopolization. The Court is nonetheless compelled to express its further conclusion that the predatory course of conduct Microsoft has pursued since

June of 1995 has revived the dangerous probability that Microsoft will attain monopoly power in a second market. Internet Explorer's share of browser usage has already risen above fifty percent, will exceed sixty percent by January 2001, and the trend continues unabated. Findings ¶¶ 372-73; *see M&M Medical Supplies & Serv., Inc. v. Pleasant Valley Hosp., Inc.*, 981 F.2d 160, 168 (4th Cir. 1992) (en banc) ("A rising share may show more probability of success than a falling share. . . . [C]laims involving greater than 50% share should be treated as attempts at monopolization when the other elements for attempted monopolization are also satisfied.") (citations omitted); *see also* IIIA Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 807d, at 354-55 (1996) (acknowledging the significance of a large, rising market share to the dangerous probability element).

II. SECTION ONE OF THE SHERMAN ACT

Section 1 of the Sherman Act prohibits "every contract, combination . . . , or conspiracy in restraint of trade or commerce . . . ." 15 U.S.C. § 1. Pursuant to this statute, courts have condemned commercial stratagems that constitute unreasonable restraints on competition. *See Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49 (1977); *Chicago Board of Trade v. United States*, 246 U.S. 231, 238-39 (1918), among them "tying arrangements" and "exclusive dealing" contracts. Tying arrangements have been found unlawful where sellers exploit their market power over one product to force unwilling buyers into acquiring another. *See Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2, 12 (1984); *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 6 (1958); *Times-Picayune Pub. Co. v. United States*, 345 U.S. 594, 605 (1953). Where agreements have been challenged as unlawful exclusive dealing, the courts have condemned only those contractual arrangements that substantially foreclose competition in a relevant market by significantly reducing the number of outlets available to a competitor to reach prospective consumers of the

competitor's product. *See Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961); *Roland Machinery Co. v. Dresser Industries, Inc.*, 749 F.2d 380, 393 (7th Cir. 1984).

A. Tying

Liability for tying under § 1 exists where (1) two separate "products" are involved; (2) the defendant affords its customers no choice but to take the tied product in order to obtain the tying product; (3) the arrangement affects a substantial volume of interstate commerce; and (4) the defendant has "market power" in the tying product market. *Jefferson Parish*, 466 U.S. at 12-18. The Supreme Court has since reaffirmed this test in *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 461-62 (1992). All four elements are required, whether the arrangement is subjected to a *per se* or Rule of Reason analysis.

The plaintiffs allege that Microsoft's combination of Windows and Internet Explorer by contractual and technological artifices constitute unlawful tying to the extent that those actions forced Microsoft's customers and consumers to take Internet Explorer as a condition of obtaining Windows. While the Court agrees with plaintiffs, and thus holds that Microsoft is liable for illegal tying under § 1, this conclusion is arguably at variance with a decision of the U.S. Court of Appeals for the D.C. Circuit in a closely related case, and must therefore be explained in some detail. Whether the decisions are indeed inconsistent is not for this Court to say.

The decision of the D.C. Circuit in question is *United States v. Microsoft Corp.*, 147 F.3d 935 (D.C. Cir. 1998) ("*Microsoft II*") which is itself related to an earlier decision of the same Circuit, *United States v. Microsoft Corp.*, 56 F.3d 1448 (D.C. Cir. 1995) ("*Microsoft I*"). The history of the controversy is sufficiently set forth in the appellate opinions and need not be recapitulated here, except to state

that those decisions anticipated the instant case, and that *Microsoft II* sought to guide this Court, insofar as practicable, in the further proceedings it fully expected to ensue on the tying issue. Nevertheless, upon reflection this Court does not believe the D.C. Circuit intended *Microsoft II* to state a controlling rule of law for purposes of this case. As the *Microsoft II* court itself acknowledged, the issue before it was the construction to be placed upon a single provision of a consent decree that, although animated by antitrust considerations, was nevertheless still primarily a matter of determining contractual intent. The court of appeals' observations on the extent to which software product design decisions may be subject to judicial scrutiny in the course of § 1 tying cases are in the strictest sense *obiter dicta*, and are thus not formally binding. Nevertheless, both prudence and the deference this Court owes to pronouncements of its own Circuit oblige that it follow in the direction it is pointed until the trail falters.

The majority opinion in *Microsoft II* evinces both an extraordinary degree of respect for changes (including "integration") instigated by designers of technological products, such as software, in the name of product "improvement," and a corresponding lack of confidence in the ability of the courts to distinguish between improvements in fact and improvements in name only, made for anticompetitive purposes. Read literally, the D.C. Circuit's opinion appears to immunize any product design (or, at least, software product design) from antitrust scrutiny, irrespective of its effect upon competition, if the software developer can postulate *any* "plausible claim" of advantage to its arrangement of code. 147 F.3d at 950.

This undemanding test appears to this Court to be inconsistent with the pertinent Supreme Court precedents in at least three respects. First, it views the market from the defendant's perspective, or, more precisely, as the defendant would like to have the market viewed. Second, it ignores

reality: The claim of advantage need only be plausible; it need not be proved. Third, it dispenses with any balancing of the hypothetical advantages against any anticompetitive effects.

The two most recent Supreme Court cases to have addressed the issue of product and market definition in the context of Sherman Act tying claims are *Jefferson Parish*, *supra*, and *Eastman Kodak*, *supra*. In *Jefferson Parish*, the Supreme Court held that a hospital offering hospital services and anesthesiology services as a package could not be found to have violated the anti-tying rules unless the evidence established that *patients*, *i.e.* consumers, perceived the services as separate products for which they desired a choice, and that the package had the effect of forcing the patients to purchase an unwanted product. 466 U.S. at 21-24, 28-29. In *Eastman Kodak* the Supreme Court held that a manufacturer of photocopying and micrographic equipment, in agreeing to sell replacement parts for its machines only to those customers who also agreed to purchase repair services from it as well, would be guilty of tying if the evidence at trial established the existence of consumer demand for parts and services separately. 504 U.S. at 463.

Both defendants asserted, as Microsoft does here, that the tied and tying products were in reality only a single product, or that every item was traded in a single market.[3] In *Jefferson Parish*, the defendant contended that it offered a "functionally integrated package of services"—a single product—but the Supreme Court concluded that the "character of the demand" for the constituent components, not their functional relationship, determined whether separate "products" were actually involved. 466 U.S. at 19. In *Eastman Kodak*, the defendant postulated that effective

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[3] Microsoft contends that Windows and Internet Explorer represent a single "integrated product," and that the relevant market is a unitary market of "platforms for software applications." Microsoft's Proposed Conclusions of Law at 49 n.28.

competition in the equipment market precluded the possibility of the use of market power anticompetitively in any after-markets for parts or services: Sales of machines, parts, and services were all responsive to the discipline of the larger equipment market. The Supreme Court declined to accept this premise in the absence of evidence of "actual market realities," 504 U.S. at 466-67, ultimately holding that "the proper market definition in this case can be determined only after a factual inquiry into the 'commercial realities' faced by consumers." *Id.* at 482 (quoting *United States v. Grinnell Corp.*, 384 U.S. 563, 572 (1966)).[4]

In both *Jefferson Parish* and *Eastman Kodak*, the Supreme Court also gave consideration to certain theoretical "valid business reasons" proffered by the defendants as to why the arrangements should be deemed benign. In *Jefferson Parish*, the hospital asserted that the combination of hospital and anesthesia services eliminated multiple problems of scheduling, supply, performance standards, and equipment maintenance. 466 U.S. at 43-44. The manufacturer in *Eastman Kodak* contended that quality control, inventory management, and the prevention of free riding justified its decision to sell parts only in conjunction with service. 504 U.S. at 483. In neither case did the Supreme Court find those justifications sufficient if anticompetitive effects were proved. *Id.* at 483-86; *Jefferson Parish*, 466 U.S. at 25 n.42. Thus, at a minimum, the admonition of the D.C. Circuit in *Microsoft II* to refrain from any product design assessment as to whether the "integration" of Windows and Internet Explorer is a "net plus," deferring to Microsoft's "plausible claim" that it is of "some advantage" to consumers, is at odds with the Supreme Court's own approach.

The significance of those cases, for this Court's purposes, is to teach that resolution of product and market

[4] In *Microsoft II* the D.C. Circuit acknowledged it was without benefit of a complete factual record which might alter its conclusion that the "Windows 95/IE package is a genuine integration." 147 F.3d at 952.

definitional problems must depend upon proof of commercial reality, as opposed to what might appear to be reasonable. In both cases the Supreme Court instructed that product and market definitions were to be ascertained by reference to evidence of consumers' perception of the nature of the products and the markets for them, rather than to abstract or metaphysical assumptions as to the configuration of the "product" and the "market." *Jefferson Parish*, 466 U.S. at 18; *Eastman Kodak*, 504 U.S. at 481-82. In the instant case, the commercial reality is that consumers today perceive operating systems and browsers as separate "products," for which there is separate demand. Findings ¶¶ 149-54. This is true notwithstanding the fact that the software code supplying their discrete functionalities can be commingled in virtually infinite combinations, rendering each indistinguishable from the whole in terms of files of code or any other taxonomy. *Id.* ¶¶ 149-50, 162-63, 187-91.

Proceeding in line with the Supreme Court cases, which are indisputably controlling, this Court first concludes that Microsoft possessed "appreciable economic power in the tying market," *Eastman Kodak*, 504 U.S. at 464, which in this case is the market for Intel-compatible PC operating systems. *See Jefferson Parish*, 466 U.S. at 14 (defining market power as ability to force purchaser to do something that he would not do in competitive market); *see also Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495, 504 (1969) (ability to raise prices or to impose tie-ins on any appreciable number of buyers within the tying product market is sufficient). While courts typically have not specified a percentage of the market that creates the presumption of "market power," no court has ever found that the requisite degree of power exceeds the amount necessary for a finding of monopoly power. *See Eastman Kodak*, 504 U.S. at 481. Because this Court has already found that Microsoft possesses monopoly power in the worldwide market for Intel-compatible PC operating systems (*i.e.*, the

tying product market), Findings ¶¶ 18-67, the threshold element of "appreciable economic power" is *a fortiori* met.

Similarly, the Court's Findings strongly support a conclusion that a "not insubstantial" amount of commerce was foreclosed to competitors as a result of Microsoft's decision to bundle Internet Explorer with Windows. The controlling consideration under this element is "simply whether a total amount of business" that is "substantial enough in terms of dollar-volume so as not to be merely *de minimis*" is foreclosed. *Fortner*, 394 U.S. at 501; *cf. International Salt Co. v. United States*, 332 U.S. 392, 396 (1947) (unreasonable *per se* to foreclose competitors from any substantial market by a tying arrangement).

Although the Court's Findings do not specify a dollar amount of business that has been foreclosed to any particular present or potential competitor of Microsoft in the relevant market,[5] including Netscape, the Court did find that Microsoft's bundling practices caused Navigator's usage share to drop substantially from 1995 to 1998, and that as a direct result Netscape suffered a severe drop in revenues from lost advertisers, Web traffic and purchases of server products. It is thus obvious that the foreclosure achieved by Microsoft's refusal to offer Internet Explorer separately from Windows exceeds the Supreme Court's *de minimis* threshold. *See Digidyne Corp. v. Data General Corp.*, 734 F.2d 1336, 1341 (9th Cir. 1984) (citing *Fortner*).

The facts of this case also prove the elements of the forced bundling requirement. Indeed, the Supreme Court has stated that the "essential characteristic" of an illegal tying arrangement is a seller's decision to exploit its market power over the tying product "to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different

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[5] Most of the quantitative evidence was presented in units other than monetary, but numbered the units in millions, whatever their nature.

terms." *Jefferson Parish*, 466 U.S. at 12. In that regard, the Court has found that, beginning with the early agreements for Windows 95, Microsoft has conditioned the provision of a license to distribute Windows on the OEMs' purchase of Internet Explorer. Findings ¶¶ 158-65. The agreements prohibited the licensees from ever modifying or deleting any part of Windows, despite the OEMs' expressed desire to be allowed to do so. *Id.* ¶¶ 158, 164. As a result, OEMs were generally not permitted, with only one brief exception, to satisfy consumer demand for a browserless version of Windows 95 without Internet Explorer. *Id.* ¶¶ 158, 202. Similarly, Microsoft refused to license Windows 98 to OEMs unless they also agreed to abstain from removing the icons for Internet Explorer from the desktop. *Id.* ¶ 213. Consumers were also effectively compelled to purchase Internet Explorer along with Windows 98 by Microsoft's decision to stop including Internet Explorer on the list of programs subject to the Add/Remove function and by its decision not to respect their selection of another browser as their default. *Id.* ¶¶ 170-72.

The fact that Microsoft ostensibly priced Internet Explorer at zero does not detract from the conclusion that consumers were forced to pay, one way or another, for the browser along with Windows. Despite Microsoft's assertion that the Internet Explorer technologies are not "purchased" since they are included in a single royalty price paid by OEMs for Windows 98, *see* Microsoft's Proposed Conclusions of Law at 12-13, it is nevertheless clear that licensees, including consumers, are forced to take, and pay for, the entire package of software and that any value to be ascribed to Internet Explorer is built into this single price. *See United States v. Microsoft Corp.*, Nos. CIV. A. 98-1232, 98-1233, 1998 WL 614485, *12 (D.D.C., Sept. 14, 1998); IIIA Philip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 760b6, at 51 (1996) ("[T]he tie may be obvious, as in the classic form, or somewhat more subtle, as when a machine is sold or leased at a price that covers 'free' servicing.").

Moreover, the purpose of the Supreme Court's "forcing" inquiry is to expose those product bundles that raise the cost or difficulty of doing business for would-be competitors to prohibitively high levels, thereby depriving consumers of the opportunity to evaluate a competing product on its relative merits. It is not, as Microsoft suggests, simply to punish firms on the basis of an increment in price attributable to the tied product. *See Fortner*, 394 U.S. at 512-14 (1969); *Jefferson Parish*, 466 U.S. at 12-13.

As for the crucial requirement that Windows and Internet Explorer be deemed "separate products" for a finding of technological tying liability, this Court's Findings mandate such a conclusion. Considering the "character of demand" for the two products, as opposed to their "functional relation," *id.* at 19, Web browsers and operating systems are "distinguishable in the eyes of buyers." *Id.*; Findings ¶¶ 149-54. Consumers often base their choice of which browser should reside on their operating system on their individual demand for the specific functionalities or characteristics of a particular browser, separate and apart from the functionalities afforded by the operating system itself. *Id.* ¶¶ 149-51. Moreover, the behavior of other, lesser software vendors confirms that it is certainly efficient to provide an operating system and a browser separately, or at least in separable form. *Id.* ¶ 153. Microsoft is the only firm to refuse to license its operating system without a browser. *Id.*; *see Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 287 (2d Cir. 1979). This Court concludes that Microsoft's decision to offer only the bundled—"integrated"—version of Windows and Internet Explorer derived not from technical necessity or business efficiencies; rather, it was the result of a deliberate and purposeful choice to quell incipient competition before it reached truly minatory proportions.

The Court is fully mindful of the reasons for the admonition of the D.C. Circuit in *Microsoft II* of the perils

associated with a rigid application of the traditional "separate products" test to computer software design. Given the virtually infinite malleability of software code, software upgrades and new application features, such as Web browsers, could virtually always be configured so as to be capable of separate and subsequent installation by an immediate licensee or end user. A court mechanically applying a strict "separate demand" test could improvidently wind up condemning "integrations" that represent genuine improvements to software that are benign from the standpoint of consumer welfare and a competitive market. Clearly, this is not a desirable outcome. Similar concerns have motivated other courts, as well as the D.C. Circuit, to resist a strict application of the "separate products" tests to similar questions of "technological tying." *See, e.g., Foremost Pro Color, Inc. v. Eastman Kodak Co.*, 703 F.2d 534, 542-43 (9th Cir. 1983); *Response of Carolina, Inc. v. Leasco Response, Inc.*, 537 F.2d 1307, 1330 (5th Cir. 1976); *Telex Corp. v. IBM Corp.*, 367 F. Supp. 258, 347 (N.D. Okla. 1973).

To the extent that the Supreme Court has spoken authoritatively on these issues, however, this Court is bound to follow its guidance and is not at liberty to extrapolate a new rule governing the tying of software products. Nevertheless, the Court is confident that its conclusion, limited by the unique circumstances of this case, is consistent with the Supreme Court's teaching to date.[6]

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[6] *Amicus curiae* Lawrence Lessig has suggested that a corollary concept relating to the bundling of "partial substitutes" in the context of software design may be apposite as a limiting principle for courts called upon to assess the compliance of these products with antitrust law. This Court has been at pains to point out that the true source of the threat posed to the competitive process by Microsoft's bundling decisions stems from the fact that a competitor to the tied product bore the potential, but had not yet matured sufficiently, to open up the tying product market to competition. Under these conditions, the anticompetitive harm from a software bundle is much more substantial

B. Exclusive Dealing Arrangements

Microsoft's various contractual agreements with some OLSs, ICPs, ISVs, Compaq and Apple are also called into question by plaintiffs as exclusive dealing arrangements under the language in § 1 prohibiting "contract[s] . . . in restraint of trade or commerce . . . ." 15 U.S.C. § 1. As detailed in § I.A.2, *supra*, each of these agreements with Microsoft required the other party to promote and distribute Internet Explorer to the partial or complete exclusion of Navigator. In exchange, Microsoft offered, to some or all of these parties, promotional patronage, substantial financial subsidies, technical support, and other valuable consideration. Under the clear standards established by the Supreme Court, these types of "vertical restrictions" are subject to a Rule of Reason analysis. *See Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49 (1977); *Jefferson Parish*, 466 U.S. at 44-45 (O'Connor, J., concurring); *cf. Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 724-26 (1988) (holding that Rule of Reason analysis presumptively applies to cases brought under § 1 of the Sherman Act).

Acknowledging that some exclusive dealing arrangements may have benign objectives and may create significant economic benefits, *see Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320, 333-35 (1961), courts have tended to condemn under the § 1 Rule of Reason test only those agreements that have the effect of foreclosing a competing manufacturer's brands from the relevant market. More specifically, courts are concerned with those exclusive

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and pernicious than the typical tie. *See* X Phillip E. Areeda, Einer Elhauge & Herbert Hovenkamp, *Antitrust Law* ¶1747 (1996). A company able to leverage its substantial power in the tying product market in order to force consumers to accept a tie of partial substitutes is thus able to spread inefficiency from one market to the next, *id.* at 232, and thereby "sabotage a nascent technology that might compete with the tying product but for its foreclosure from the market." III Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1746.1d at 495 (Supp. 1999).

dealing arrangements that work to place so much of a market's available distribution outlets in the hands of a single firm as to make it difficult for other firms to continue to compete effectively, or even to exist, in the relevant market. *See U.S. Healthcare Inc. v. Healthsource, Inc.*, 986 F.2d 589, 595 (1st Cir. 1993); *Interface Group, Inc. v. Massachusetts Port Authority*, 816 F.2d 9, 11 (1st Cir. 1987) (relying upon III Phillip E. Areeda & Donald F. Turner, *Antitrust Law* ¶ 732 (1978), *Tampa Electric*, 365 U.S. at 327-29, and *Standard Oil Co. v. United States*, 337 U.S. 293 (1949)).

To evaluate an agreement's likely anticompetitive effects, courts have consistently looked at a variety of factors, including: (1) the degree of exclusivity and the relevant line of commerce implicated by the agreements' terms; (2) whether the percentage of the market foreclosed by the contracts is substantial enough to import that rivals will be largely excluded from competition; (3) the agreements' actual anticompetitive effect in the relevant line of commerce; (4) the existence of any legitimate, procompetitive business justifications offered by the defendant; (5) the length and irrevocability of the agreements; and (6) the availability of any less restrictive means for achieving the same benefits. *See, e.g., Tampa Electric*, 365 U.S. at 326-35; *Roland Machinery Co. v. Dresser Industries, Inc.*, 749 F.2d 380, 392-95 (7th Cir. 1984); *see also* XI Herbert Hovenkamp, *Antitrust Law* ¶ 1820 (1998).

Where courts have found that the agreements in question failed to foreclose absolutely outlets that together accounted for a substantial percentage of the total distribution of the relevant products, they have consistently declined to assign liability. *See, e.g., id.* ¶ 1821; *U.S. Healthcare*, 986 F.2d at 596-97; *Roland Mach. Co.*, 749 F.2d at 394 (failure of plaintiff to meet threshold burden of proving that exclusive dealing arrangement is likely to keep

at least one significant competitor from doing business in relevant market dictates no liability under § 1). This Court has previously observed that the case law suggests that, unless the evidence demonstrates that Microsoft's agreements excluded Netscape altogether from access to roughly forty percent of the browser market, the Court should decline to find such agreements in violation of § 1. *See United States v. Microsoft Corp.*, Nos. CIV. A. 98-1232, 98-1233, 1998 WL 614485, at *19 (D.D.C. Sept. 14, 1998) (citing cases that tended to converge upon forty percent foreclosure rate for finding of § 1 liability).

The only agreements revealed by the evidence which could be termed so "exclusive" as to merit scrutiny under the § 1 Rule of Reason test are the agreements Microsoft signed with Compaq, AOL and several other OLSs, the top ICPs, the leading ISVs, and Apple. The Findings of Fact also establish that, among the OEMs discussed *supra*, Compaq was the only one to fully commit itself to Microsoft's terms for distributing and promoting Internet Explorer to the exclusion of Navigator. Beginning with its decisions in 1996 and 1997 to promote Internet Explorer exclusively for its PC products, Compaq essentially ceased to distribute or pre-install Navigator at all in exchange for significant financial remuneration from Microsoft. Findings ¶¶ 230-34. AOL's March 12 and October 28, 1996 agreements with Microsoft also guaranteed that, for all practical purposes, Internet Explorer would be AOL's browser of choice, to be distributed and promoted through AOL's dominant, flagship online service, thus leaving Navigator to fend for itself. *Id.* ¶¶ 287-90, 293-97. In light of the severe shipment quotas and promotional restrictions for third-party browsers imposed by the agreements, the fact that Microsoft still permitted AOL to offer Navigator through a few subsidiary channels does not negate this conclusion. The same conclusion as to exclusionary effect can be drawn with respect to Microsoft's agreements with AT&T WorldNet, Prodigy and CompuServe, since those contract terms were almost

identical to the ones contained in AOL's March 1996 agreement. *Id.* ¶¶ 305-06.

Microsoft also successfully induced some of the most popular ICPs and ISVs to commit to promote, distribute and utilize Internet Explorer technologies exclusively in their Web content in exchange for valuable placement on the Windows desktop and technical support. Specifically, the "Top Tier" and "Platinum" agreements that Microsoft formed with thirty-four of the most popular ICPs on the Web ensured that Navigator was effectively shut out of these distribution outlets for a significant period of time. *Id.* ¶¶ 317-22, 325-26, 332. In the same way, Microsoft's "First Wave" contracts provided crucial technical information to dozens of leading ISVs that agreed to make their Web-centric applications completely reliant on technology specific to Internet Explorer. *Id.* ¶¶ 337, 339-40. Finally, Apple's 1997 Technology Agreement with Microsoft prohibited Apple from actively promoting any non-Microsoft browsing software in any way or from pre-installing a browser other than Internet Explorer. *Id.* ¶¶ 350-52. This arrangement eliminated all meaningful avenues of distribution of Navigator through Apple. *Id.*

Notwithstanding the extent to which these "exclusive" distribution agreements preempted the most efficient channels for Navigator to achieve browser usage share, however, the Court concludes that Microsoft's multiple agreements with distributors did not ultimately deprive Netscape of the ability to have access to every PC user worldwide to offer an opportunity to install Navigator. Navigator can be downloaded from the Internet. It is available through myriad retail channels. It can (and has been) mailed directly to an unlimited number of households. How precisely it managed to do so is not shown by the evidence, but in 1998 alone, for example, Netscape was able to distribute 160 million copies of Navigator, contributing to an increase in its installed base from 15 million in 1996 to 33

million in December 1998. *Id.* ¶ 378. As such, the evidence does not support a finding that these agreements completely excluded Netscape from any constituent portion of the worldwide browser market, the relevant line of commerce.

The fact that Microsoft's arrangements with various firms did not foreclose enough of the relevant market to constitute a § 1 violation in no way detracts from the Court's assignment of liability for the same arrangements under § 2. As noted above, all of Microsoft's agreements, including the non-exclusive ones, severely restricted Netscape's access to those distribution channels leading most efficiently to the acquisition of browser usage share. They thus rendered Netscape harmless as a platform threat and preserved Microsoft's operating system monopoly, in violation of § 2. But virtually all the leading case authority dictates that liability under § 1 must hinge upon whether Netscape was actually shut out of the Web browser market, or at least whether it was forced to reduce output below a subsistence level. The fact that Netscape was not allowed access to the most direct, efficient ways to cause the greatest number of consumers to use Navigator is legally irrelevant to a final determination of plaintiffs' § 1 claims.

Other courts in similar contexts have declined to find liability where alternative channels of distribution are available to the competitor, even if those channels are not as efficient or reliable as the channels foreclosed by the defendant. In *Omega Environmental, Inc. v. Gilbarco, Inc.*, 127 F.3d 1157 (9th Cir. 1997), for example, the Ninth Circuit found that a manufacturer of petroleum dispensing equipment "foreclosed roughly 38% of the relevant market for sales." 127 F.3d at 1162. Nonetheless, the Court refused to find the defendant liable for exclusive dealing because "potential alternative sources of distribution" existed for its competitors. *Id.* at 1163. Rejecting plaintiff's argument (similar to the one made in this case) that these alternatives were "inadequate substitutes for the existing distributors,"

the Court stated that "[c]ompetitors are free to sell directly, to develop alternative distributors, or to compete for the services of existing distributors. Antitrust laws require no more." *Id.*; *accord Seagood Trading Corp. v. Jerrico, Inc.*, 924 F.2d 1555, 1572-73 (11th Cir. 1991).

III. THE STATE LAW CLAIMS

In their amended complaint, the plaintiff states assert that the same facts establishing liability under §§ 1 and 2 of the Sherman Act mandate a finding of liability under analogous provisions in their own laws. The Court agrees. The facts proving that Microsoft unlawfully maintained its monopoly power in violation of § 2 of the Sherman Act are sufficient to meet analogous elements of causes of action arising under the laws of each plaintiff state.[7] The Court reaches the same conclusion with respect to the facts establishing that Microsoft attempted to monopolize the browser market in violation of § 2,[8] and with respect to those

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[7] *See* Cal. Bus. & Prof. Code §§ 16720, 16726, 17200 (West 1999); Conn. Gen. Stat. § 35-27 (1999); D.C. Code § 28-4503 (1996); Fla. Stat. chs. 501.204(1), 542.19 (1999); 740 Ill. Comp. Stat. 10/3 (West 1999); Iowa Code § 553.5 (1997); Kan. Stat. §§ 50-101 *et seq.* (1994); Ky. Rev. Stat. §§ 367.170, 367.175 (Michie 1996); La. Rev. Stat. §§ 51:123, 51:1405 (West 1986); Md. Com. Law II Code Ann. § 11-204 (1990); Mass. Gen. Laws ch. 93A, § 2; Mich. Comp. Laws § 445.773 (1989); Minn. Stat. § 325D.52 (1998); N.M. Stat. § 57-1-2 (Michie 1995); N.Y. Gen. Bus. Law § 340 (McKinney 1998); N.C. Gen. Stat. §§ 75-1.1, 75-2.1 (1999); Ohio Rev. Code §§ 1331.01, 1331.02 (Anderson 1993); Utah Code § 76-10-914 (1999); W.Va. Code § 47-18-4 (1999); Wis. Stat. § 133.03(2) (West 1989 & Supp. 1998).

[8] *See* Cal. Bus. & Prof. Code § 17200 (West 1999); Conn. Gen. Stat. § 35-27 (1999); D.C. Code § 28-4503 (1996); Fla. Stat. chs. 501.204(1), 542.19 (1999); 740 Ill. Comp. Stat. 10/3(3) (West 1999); Iowa Code § 553.5 (1997); Kan. Stat. §§ 50-101 *et seq.* (1994); Ky. Rev. Stat. §§ 367.170, 367.175 (Michie 1996); La. Rev. Stat. §§ 51:123, 51:1405 (West 1986); Md. Com. Law II Code Ann. § 11-204(a)(2) (1990); Mass. Gen. Laws ch. 93A, § 2; Mich. Comp. Laws § 445.773 (1989); Minn. Stat. § 325D.52 (1998); N.M. Stat. § 57-1-2 (Michie 1995); N.Y. Gen. Bus. Law § 340 (McKinney 1988); N.C. Gen. Stat. §§ 75-1.1, 75-2.1 (1999); Ohio Rev. Code §§ 1331.01, 1331.02

facts establishing that Microsoft instituted an improper tying arrangement in violation of § 1.[9]

The plaintiff states concede that their laws do not condemn any act proved in this case that fails to warrant liability under the Sherman Act. States' Reply in Support of their Proposed Conclusions of Law at 1. Accordingly, the Court concludes that, for reasons identical to those stated in § II.B, *supra*, the evidence in this record does not warrant finding Microsoft liable for exclusive dealing under the laws of any of the plaintiff states.

Microsoft contends that a plaintiff cannot succeed in an antitrust claim under the laws of California, Louisiana, Maryland, New York, Ohio, or Wisconsin without proving an element that is not required under the Sherman Act, namely, *intrastate* impact. Assuming that each of those states has, indeed, expressly limited the application of its antitrust laws to activity that has a significant, adverse effect on competition within the state or is otherwise contrary to state interests, that element is manifestly proven by the facts presented here. The Court has found that Microsoft is the leading supplier of operating systems for PCs and that it transacts business in all fifty of the United States. Findings

(Anderson 1993); Utah Code § 76-10-914 (1999); W.Va. Code § 47-18-4 (1999); Wis. Stat. § 133.03(2) (West 1989 & Supp. 1998).

[9] *See* Cal. Bus. & Prof. Code §§ 16727, 17200 (West 1999); Conn. Gen. Stat. §§ 35-26, 35-29 (1999); D.C. Code § 28-4502 (1996); Fla. Stat. chs. 501.204(1), 542.18 (1999); 740 Ill. Comp. Stat. 10/3(4) (West 1999); Iowa Code § 553.4 (1997); Kan. Stat. §§ 50-101 *et seq.* (1994); Ky. Rev. Stat. §§ 367.170, 367.175 (Michie 1996); La. Rev. Stat. §§ 51:122, 51:1405 (West 1986); Md. Com. Law II Code Ann. § 11-204(a)(1) (1990); Mass. Gen. Laws ch. 93A, § 2; Mich. Comp. Laws § 445.772 (1989); Minn. Stat. § 325D.52 (1998); N.M. Stat. § 57-1-1 (Michie 1995); N.Y. Gen. Bus. Law § 340 (McKinney 1988); N.C. Gen. Stat. §§ 75-1.1, 75-2.1 (1999); Ohio Rev. Code §§ 1331.01, 1331.02 (Anderson 1993); Utah Code § 76-10-914 (1999); W.Va. Code § 47-18-3 (1999); Wis. Stat. § 133.03(1) (West 1989 & Supp. 1998).

¶ 9.[10] It is common and universal knowledge that millions of citizens of, and hundreds, if not thousands, of enterprises in each of the United States and the District of Columbia utilize PCs running on Microsoft software. It is equally clear that certain companies that have been adversely affected by Microsoft's anticompetitive campaign—a list that includes IBM, Hewlett-Packard, Intel, Netscape, Sun, and many others—transact business in, and employ citizens of, each of the plaintiff states. These facts compel the conclusion that, in each of the plaintiff states, Microsoft's anticompetitive conduct has significantly hampered competition.

Microsoft once again invokes the federal Copyright Act in defending against state claims seeking to vindicate the rights of OEMs and others to make certain modifications to Windows 95 and Windows 98. The Court concludes that these claims do not encroach on Microsoft's federally protected copyrights and, thus, that they are not pre-empted under the Supremacy Clause. The Court already concluded in § I.A.2.a.i, *supra*, that Microsoft's decision to bundle its browser and impose first-boot and start-up screen restrictions constitute independent violations of § 2 of the Sherman Act. It follows as a matter of course that the same actions merit liability under the plaintiff states' antitrust and unfair competition laws. Indeed, the parties agree that the standards for liability under the several plaintiff states' antitrust and unfair competition laws are, for the purposes of this case, identical to those expressed in the federal statute. States' Reply in Support of their Proposed Conclusions of Law at 1; Microsoft's Sur-Reply in Response to the States' Reply at 2 n.1. Thus, these state laws cannot "stand[] as an obstacle to" the goals of the federal copyright law to any greater extent than do the federal antitrust laws, for they target exactly the same type of anticompetitive behavior. *Hines v. Davidowitz*,

[10] The omission of the District of Columbia from this finding was an oversight on the part of the Court; Microsoft obviously conducts business in the District of Columbia as well.

312 U.S. 52, 67 (1941). The Copyright Act's own preemption clause provides that "[n]othing in this title annuls or limits any rights or remedies under the common law or statutes of any State with respect to . . . activities violating legal or equitable rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 . . . ." 17 U.S.C. § 301(b)(3). Moreover, the Supreme Court has recognized that there is "nothing either in the language of the copyright laws or in the history of their enactment to indicate any congressional purpose to deprive the states, either in whole or in part, of their long-recognized power to regulate combinations in restraint of trade." *Watson v. Buck*, 313 U.S. 387, 404 (1941). *See also Allied Artists Pictures Corp. v. Rhodes*, 496 F. Supp. 408, 445 (S.D. Ohio 1980), *aff'd in relevant part*, 679 F.2d 656 (6th Cir. 1982) (drawing upon similarities between federal and state antitrust laws in support of notion that authority of states to regulate market practices dealing with copyrighted subject matter is well-established); *cf. Hines*, 312 U.S. at 67 (holding state laws preempted when they "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress").

The Court turns finally to the counterclaim that Microsoft brings against the attorneys general of the plaintiff states under 42 U.S.C. § 1983. In support of its claim, Microsoft argues that the attorneys general are seeking relief on the basis of state laws, repeats its assertion that the imposition of this relief would deprive it of rights granted to it by the Copyright Act, and concludes with the contention that the attorneys general are, "under color of" state law, seeking to deprive Microsoft of rights secured by federal law—a classic violation of 42 U.S.C. § 1983.

Having already addressed the issue of whether granting the relief sought by the attorneys general would entail conflict with the Copyright Act, the Court rejects Microsoft's counterclaim on yet more fundamental grounds as well: It is

inconceivable that their resort to this Court could represent an effort on the part of the attorneys general to deprive Microsoft of rights guaranteed it under federal law, because this Court does not possess the power to act in contravention of federal law. Therefore, since the conduct it complains of is the pursuit of relief in federal court, Microsoft fails to state a claim under 42 U.S.C. § 1983. Consequently, Microsoft's request for a declaratory judgment against the states under 28 U.S.C. §§ 2201 and 2202 is denied, and the counterclaim is dismissed.

/s/
Thomas Penfield Jackson
U.S. District Judge

Date: 4/3/00

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. MICROSOFT CORPORATION, Defendant.	Civil Action No. 98-1232 (TPJ)
STATE OF NEW YORK, *et al.*, Plaintiffs, v. MICROSOFT CORPORATION, Defendant.	Filed Apr 3 - 2000 Nancy Mayer Whittington, Clerk U.S. District Court Civil Action No. 98-1233 (TPJ)
MICROSOFT CORPORATION, Counterclaim-Plaintiff, v. ELIOT SPITZER, attorney general of the State of New York, in his official capacity, *et al.*, Counterclaim-Defendants.	

ORDER

In accordance with the Conclusions of Law filed herein this date, it is, this 3rd day of April, 2000,

ORDERED, ADJUDGED, and DECLARED, that Microsoft has violated §§ 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, as well as the following state law provisions: Cal. Bus. & Prof. Code §§ 16720, 16726, 17200; Conn. Gen. Stat. §§ 35-26, 35-27, 35-29; D.C. Code §§ 28-4502, 28-4503; Fla. Stat. chs. 501.204(1), 542.18, 542.19; 740 Ill. Comp. Stat. ch. 10/3; Iowa Code §§ 553.4, 553.5; Kan. Stat. §§ 50-101 *et seq.*; Ky. Rev. Stat. §§ 367.170, 367.175; La.

Rev. Stat. §§ 51:122, 51:123, 51:1405; Md. Com. Law II Code Ann. § 11-204; Mass. Gen. Laws ch. 93A, § 2; Mich. Comp. Laws §§ 445.772, 445.773; Minn. Stat. § 325D.52; N.M. Stat. §§ 57-1-1, 57-1-2; N.Y. Gen. Bus. Law § 340; N.C. Gen. Stat. §§ 75-1.1, 75-2.1; Ohio Rev. Code §§ 1331.01, 1331.02; Utah Code § 76-10-914; W.Va. Code §§ 47-18-3, 47-18-4; Wis. Stat. § 133.03(1)-(2); and it is

FURTHER ORDERED, that judgment is entered for the United States on its second, third, and fourth claims for relief in Civil Action No. 98-1232; and it is

FURTHER ORDERED, that the first claim for relief in Civil Action No. 98-1232 is dismissed with prejudice; and it is

FURTHER ORDERED, that judgment is entered for the plaintiff states on their first, second, fourth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, sixteenth, seventeenth, eighteenth, nineteenth, twentieth, twenty-first, twenty-second, twenty-fourth, twenty-fifth, and twenty-sixth claims for relief in Civil Action No. 98-1233; and it is

FURTHER ORDERED, that the fifth claim for relief in Civil Action No. 98-1233 is dismissed with prejudice; and it is

FURTHER ORDERED, that Microsoft's first and second claims for relief in Civil Action No. 98-1233 are dismissed with prejudice; and it is

FURTHER ORDERED, that the Court shall, in accordance with the Conclusions of Law filed herein, enter an Order with respect to appropriate relief, including an award of costs and fees, following proceedings to be established by further Order of the Court.

/s/
Thomas Penfield Jackson
U.S. District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. MICROSOFT CORPORATION, Defendant.	Civil Action No. 98-1232 (TPJ)
STATE OF NEW YORK, *ex rel.* Attorney General ELIOT SPITZER, *et al.*, Plaintiffs and Counterclaim-Defendants, v. MICROSOFT CORPORATION, Defendant and Counterclaim-Plaintiff.	Civil Action No. 98-1233 (TPJ)

Filed Nov 05 1999
Nancy Mayer-Whittington, Clerk
U.S. District Court

FINDINGS OF FACT

These consolidated civil antitrust actions alleging violations of the Sherman Act, §§ 1 and 2, and various state statutes by the defendant Microsoft Corporation were tried to the Court, sitting without a jury, between October 19, 1998, and June 24, 1999. The Court has considered the record evidence submitted by the parties, made determinations as to its relevancy and materiality, assessed the credibility of the testimony of the witnesses, both written and oral, and ascertained for its purposes the probative significance of the documentary and visual evidence presented. Upon the record before the Court as of July 28, 1999, at the close of the admission of evidence, pursuant to FED. R. CIV. P. 52(a), the Court finds the following facts to have been proved by a preponderance of the evidence. The Court shall state the

conclusions of law to be drawn therefrom in a separate Memorandum and Order to be filed in due course.

I. BACKGROUND

1. A "personal computer" ("PC") is a digital information processing device designed for use by one person at a time. A typical PC consists of central processing components (*e.g.*, a microprocessor and main memory) and mass data storage (such as a hard disk). A typical PC system consists of a PC, certain peripheral input/output devices (including a monitor, a keyboard, a mouse, and a printer), and an operating system. PC systems, which include desktop and laptop models, can be distinguished from more powerful, more expensive computer systems known as "servers," which are designed to provide data, services, and functionality through a digital network to multiple users.

2. An "operating system" is a software program that controls the allocation and use of computer resources (such as central processing unit time, main memory space, disk space, and input/output channels). The operating system also supports the functions of software programs, called "applications," that perform specific user-oriented tasks. The operating system supports the functions of applications by exposing interfaces, called "application programming interfaces," or "APIs." These are synapses at which the developer of an application can connect to invoke pre-fabricated blocks of code in the operating system. These blocks of code in turn perform crucial tasks, such as displaying text on the computer screen. Because it supports applications while interacting more closely with the PC system's hardware, the operating system is said to serve as a "platform."

3. An Intel-compatible PC is one designed to function with Intel's 80x86/Pentium families of microprocessors or with compatible microprocessors manufactured by Intel or by other firms.

4. An operating system designed to run on an Intel-compatible PC will not function on a non-Intel-compatible PC, nor will an operating system designed for a non-Intel-compatible PC function on an Intel-compatible one. Similarly, an application that relies on APIs specific to one operating system will not, generally speaking, function on another operating system unless it is first adapted, or "ported," to the APIs of the other operating system.

5. Defendant Microsoft Corporation is organized under the laws of the State of Washington, and its headquarters are situated in Redmond, Washington. Since its inception, Microsoft has focused primarily on developing software and licensing it to various purchasers.

6. In 1981, Microsoft released the first version of its Microsoft Disk Operating System, commonly known as "MS-DOS." The system had a character-based user interface that required the user to type specific instructions at a command prompt in order to perform tasks such as launching applications and copying files. When the International Business Machines Corporation ("IBM") selected MS-DOS for pre-installation on its first generation of PCs, Microsoft's product became the predominant operating system sold for Intel-compatible PCs.

7. In 1985, Microsoft began shipping a software package called Windows. The product included a graphical user interface, which enabled users to perform tasks by selecting icons and words on the screen using a mouse. Although originally just a user-interface, or "shell," sitting on top of MS-DOS, Windows took on more operating-system functionality over time.

8. In 1995, Microsoft introduced a software package called Windows 95, which announced itself as the first operating system for Intel-compatible PCs that exhibited the same sort of integrated features as the Mac OS running PCs manufactured by Apple Computer, Inc. ("Apple"). Windows

95 enjoyed unprecedented popularity with consumers, and in June 1998, Microsoft released its successor, Windows 98.

9. Microsoft is the leading supplier of operating systems for PCs. The company transacts business in all fifty of the United States and in most countries around the world.

10. Microsoft licenses copies of its software programs directly to consumers. The largest part of its MS-DOS and Windows sales, however, consists of licensing the products to manufacturers of PCs (known as "original equipment manufacturers" or "OEMs"), such as the IBM PC Company and the Compaq Computer Corporation ("Compaq"). An OEM typically installs a copy of Windows onto one of its PCs before selling the package to a consumer under a single price.

11. The Internet is a global electronic network, consisting of smaller, interconnected networks, which allows millions of computers to exchange information over telephone wires, dedicated data cables, and wireless links. The Internet links PCs by means of servers, which run specialized operating systems and applications designed for servicing a network environment.

12. The World Wide Web ("the Web") is a massive collection of digital information resources stored on servers throughout the Internet. These resources are typically provided in the form of hypertext documents, commonly referred to as "Web pages," that may incorporate any combination of text, graphics, audio and video content, software programs, and other data. A user of a computer connected to the Internet can publish a page on the Web simply by copying it into a specially designated, publicly accessible directory on a Web server. Some Web resources are in the form of applications that provide functionality through a user's PC system but actually execute on a server.

13. Internet content providers ("ICPs") are the individuals and organizations that have established a

presence, or "site," on the Web by publishing a collection of Web pages. Most Web pages are in the form of "hypertext"; that is, they contain annotated references, or "hyperlinks," to other Web pages. Hyperlinks can be used as cross-references within a single document, between documents on the same site, or between documents on different sites.

14. Typically, one page on each Web site is the "home page," or the first access point to the site. The home page is usually a hypertext document that presents an overview of the site and hyperlinks to the other pages comprising the site.

15. PCs typically connect to the Internet through the services of Internet access providers ("IAPs"), which generally charge subscription fees to their customers in the United States. There are two types of IAPs. Online services ("OLSs") such as America Online ("AOL"), Prodigy, and the Microsoft Network ("MSN") offer, in addition to Internet access, various services and an array of proprietary content. Internet service providers ("ISPs") such as MindSpring and Netcom, on the other hand, offer few services apart from Internet access and relatively little of their own content.

16. A "Web client" is software that, when running on a computer connected to the Internet, sends information to and receives information from Web servers throughout the Internet. Web clients and servers transfer data using a standard known as the Hypertext Transfer Protocol ("HTTP"). A "Web browser" is a type of Web client that enables a user to select, retrieve, and perceive resources on the Web. In particular, Web browsers provide a way for a user to view hypertext documents and follow the hyperlinks that connect them, typically by moving the cursor over a link and depressing the mouse button.

17. Although certain Web browsers provided graphical user interfaces as far back as 1993, the first widely-popular graphical browser distributed for profit, called

Navigator, was brought to market by the Netscape Communications Corporation ("Netscape") in December 1994. Microsoft introduced its browser, called Internet Explorer, in July 1995.

II. THE RELEVANT MARKET

18. Currently there are no products, nor are there likely to be any in the near future, that a significant percentage of consumers worldwide could substitute for Intel-compatible PC operating systems without incurring substantial costs. Furthermore, no firm that does not currently market Intel-compatible PC operating systems could start doing so in a way that would, within a reasonably short period of time, present a significant percentage of consumers with a viable alternative to existing Intel-compatible PC operating systems. It follows that, if one firm controlled the licensing of all Intel-compatible PC operating systems worldwide, it could set the price of a license substantially above that which would be charged in a competitive market and leave the price there for a significant period of time without losing so many customers as to make the action unprofitable. Therefore, in determining the level of Microsoft's market power, the relevant market is the licensing of all Intel-compatible PC operating systems worldwide.

A. Demand Substitutability

1. Server Operating Systems

19. Consumers could not turn from Intel-compatible PC operating systems to Intel-compatible server operating systems without incurring substantial costs, since the latter type of system is sold at a significantly higher price than the former. A consumer intent on acquiring a server operating system would also have to buy a computer of substantially greater power and price than an Intel-compatible PC, because server operating systems generally cannot function properly on PC hardware. The price of an Intel-compatible

PC operating system accounts for only a very small percentage of the price of an Intel-compatible PC system. Thus, even a substantial increase in the price of an Intel-compatible PC operating system above the competitive level would result in only a trivial increase in the price of an Intel-compatible PC system. Very few consumers would purchase expensive servers in response to a trivial increase in the price of an Intel-compatible PC system. Furthermore, a consumer would not obtain a satisfactory substitute for an Intel-compatible PC operating system even if he purchased a server, since server operating systems lack the features—and support for the breadth of applications—that induce users to purchase Intel-compatible PC operating systems.

2. Non-Intel-Compatible PC Operating Systems

20. Since only Intel-compatible PC operating systems will work with Intel-compatible PCs, a consumer cannot opt for a non-Intel-compatible PC operating system without obtaining a non-Intel-compatible PC. Thus, for consumers who already own an Intel-compatible PC system, the cost of switching to a non-Intel compatible PC operating system includes the price of not only a new operating system, but also a new PC and new peripheral devices. It also includes the effort of learning to use the new system, the cost of acquiring a new set of compatible applications, and the work of replacing files and documents that were associated with the old applications. Very few consumers would incur these costs in response to the trivial increase in the price of an Intel-compatible PC system that would result from even a substantial increase in the price of an Intel-compatible PC operating system. For example, users of Intel-compatible PC operating systems would not switch in large numbers to the Mac OS in response to even a substantial, sustained increase in the price of an Intel-compatible PC operating system.

21. The response to a price increase would be somewhat greater among consumers buying their first PC

system, because they would not have already invested time and money in an Intel-compatible PC system and a set of compatible applications. Apple does not license the Mac OS separately from its PC hardware, however, and the package of hardware and software comprising an Apple PC system is priced substantially higher than the average price of an Intel-compatible PC system. Furthermore, consumer demand for Apple PC systems suffers on account of the relative dearth of applications written to run on the Mac OS. It is unlikely, then, that a firm controlling the licensing of all Intel-compatible PC operating systems would lose so many new PC users to Apple as the result of a substantial, enduring price increase as to make the action unprofitable. It is therefore proper to define a relevant market that excludes the Mac OS. In any event, as Section III of these Findings demonstrates, including the Mac OS in the relevant market would not alter the Court's conclusion as to the level of Microsoft's market power.

3. Information Appliances

22. No operating system designed for a hand-held computer, a "smart" wireless telephone, a television set-top box, or a game console is capable of performing as an adequate operating system for an Intel-compatible PC. Therefore, in order to adopt a substitute for the Intel-compatible PC operating system from the realm of "information appliances," a consumer must acquire one or more of these devices in lieu of an Intel-compatible PC system.

23. It is possible that, within the next few years, those consumers who otherwise would use an Intel-compatible PC system solely for storing addresses and schedules, for sending and receiving E-mail, for browsing the Web, and for playing video games might be able to choose a complementary set of information appliances over an Intel-compatible PC system without incurring substantial costs. To the extent this substitution occurs, though, it will be the

result of innovation by the producers of information appliances, and it will occur even if Intel-compatible PC operating systems are priced at the same level that they would be in a competitive market. More importantly, while some consumers may decide to make do with one or more information appliances in place of an Intel-compatible PC system, the number of these consumers will, for the foreseeable future, remain small in comparison to the number of consumers deciding that they still need an Intel-compatible PC system. One reason for this is the fact that no single type of information appliance, nor even all types in the aggregate, provides all of the features that most consumers have come to rely on in their PC systems and in the applications that run on them. Thus, most of those who buy information appliances will do so in addition to, rather than instead of, buying an Intel-compatible PC system. Not surprisingly, then, sales of PC systems are not expected to suffer on account of the growing consumer interest in information appliances. It follows that, for the foreseeable future, a firm controlling the licensing of all Intel-compatible PC operating systems could set prices substantially above competitive levels without losing an unacceptable amount of business to information appliances.

4. Network Computers

24. A network computer system (sometimes called a "thin client") typically contains central processing components with basic capabilities, certain key peripheral devices (such as a monitor, a keyboard, and a mouse), an operating system, and a browser. The system contains no mass storage, however, and it processes little if any data locally. Instead, the system receives processed data and software as needed from a server across a network. A network computer system lacks the hardware resources to support an Intel-compatible PC operating system. It follows that software applications written to run on a specific Intel-compatible PC operating system will not run on a network

computer. Network computers can run applications residing on a designated server, however. Moreover, a network computer system typically can run applications residing on other servers, so long as those applications are accessible through Web sites. The ability to run server-based applications is not exclusive to network computer systems, however. Generally speaking, any PC system equipped with a browser and an Internet connection is capable of accessing applications hosted through Web sites.

25. Since the network computing model relies heavily on the processing power and memory of servers, the requirements for the user's hardware (and thus the price of that hardware) are low relative to those of an Intel-compatible PC system. Still, a user who already owns a relatively expensive Intel-compatible PC system is not likely to abandon the investment and acquire less powerful hardware just because one of the least expensive components of his PC system—the operating system—is substantially more expensive than it would be under competitive conditions. Just as does the Mac OS, the network computing model presents a somewhat more attractive alternative to the first-time computer buyer. But as in the case where a prospective purchaser is considering acquiring the Apple alternative, a new buyer considering the network computing model must choose between types of computer systems. If the consumer opts for the less expensive hardware of the network computer, that hardware will not support an Intel-compatible PC operating system; and if the new buyer opts for the more expensive hardware of an Intel-compatible PC, an Intel-compatible PC operating system will almost certainly come pre-installed (and in any event represent very little additional cost relative to the price of the hardware).

26. Only a few firms currently market network computer systems, and the systems have yet to attract substantial consumer demand. In part, this is because PC systems, which can store and process data locally as well as

communicate with a server, have decreased so much in price as to call into question the value proposition of buying a network computer system. This fact would not change if the price of an Intel-compatible PC operating system rose significantly, because the resulting change in the price of an Intel-compatible PC system would be very minor. Another reason for the limited demand for network computer systems is the fact that few consumers are in a position to turn from PC systems to network computer systems without making substantial sacrifices; for the network computing option exhibits significant shortcomings for current PC owners and first-time buyers alike. The problems of latency, congestion, asynchrony, and insecurity across a communications network, and contention for limited processing and memory resources at the remote server, can all result in a substantial derogation of computing performance. Moreover, the owner of a network computer is required to enter into long-term dependency upon the owner of a remote server in order to obtain functionality that would reside within his control if he owned a PC system. If network computing becomes a viable alternative to PC-based computing, it will be because innovation by the proponents of the network computing model overcomes these problems, and it will happen even if Intel-compatible PC operating systems are priced at competitive levels. In any case, that day has not arrived, nor does it appear imminent.

5. Server-Based Computing Generally

27. As the bandwidth available to the average user increases, "portal" Web sites, which aggregate Web content and provide services such as search engines, E-mail, and travel reservation systems, could begin to host full lines of the server-based, personal-productivity applications that have begun to appear in small numbers on the Web. If so, increasing numbers of computer users equipped with Web browsers and IAP connections could begin to conduct a significant portion of their computing through these portals.

To the extent they might do so, users probably would not regard the Mac OS's limited stock of compatible applications as the major drawback to using an Apple PC system that it is today, and they might be increasingly drawn to network computer systems and information appliances. The variety and ease of use of server-based applications accessible through browsers would have to increase a great deal from today's levels, however, before the total cost of dispensing with an Intel-compatible PC operating system would decline sufficiently to impose a significant constraint on the pricing of those systems. Again, that day is not imminent; for at least the next few years, the overwhelming majority of consumers accessing server-based applications will do so using an Intel-compatible PC system and a browser.

6. Middleware

28. Operating systems are not the only software programs that expose APIs to application developers. The Netscape Web browser and Sun Microsystems, Inc.'s Java class libraries are examples of non-operating system software that do likewise. Such software is often called "middleware," because it relies on the interfaces provided by the underlying operating system while simultaneously exposing its own APIs to developers. Currently no middleware product exposes enough APIs to allow independent software vendors ("ISVs") profitably to write full-featured personal productivity applications that rely solely on those APIs.

29. Even if middleware deployed enough APIs to support full-featured applications, it would not function on a computer without an operating system to perform tasks such as managing hardware resources and controlling peripheral devices. But to the extent the array of applications relying solely on middleware comes to satisfy all of a user's needs, the user will not care whether there exists a large number of other applications that are directly compatible with the

underlying operating system. Thus, the growth of middleware-based applications could lower the costs to users of choosing a non-Intel-compatible PC operating system like the Mac OS. It remains to be seen, though, whether there will ever be a sustained stream of full-featured applications written solely to middleware APIs. In any event, it would take several years for middlware and the applications it supports to evolve from the status quo to a point at which the cost to the average consumer of choosing a non-Intel compatible PC operating system over an Intel-compatible one falls so low as to constrain the pricing of the latter systems.

B. The Possibility of Supply Responses

30. Firms that do not currently produce Intel-compatible PC operating systems could do so. What is more, once a firm had written the necessary software code, it could produce millions of copies of its operating system at relatively low cost. The ability to meet a large demand is useless, however, if the demand for the product is small, and signs do not indicate large demand for a new Intel-compatible PC operating system. To the contrary, they indicate that the demand for a new Intel-compatible PC operating system would be severely constrained by an intractable "chicken-and-egg" problem: The overwhelming majority of consumers will only use a PC operating system for which there already exists a large and varied set of high-quality, full-featured applications, and for which it seems relatively certain that new types of applications and new versions of existing applications will continue to be marketed at pace with those written for other operating systems. Unfortunately for firms whose products do not fit that bill, the porting of applications from one operating system to another is a costly process. Consequently, software developers generally write applications first, and often exclusively, for the operating system that is already used by a dominant share of all PC users. Users do not want to invest

in an operating system until it is clear that the system will support generations of applications that will meet their needs, and developers do not want to invest in writing or quickly porting applications for an operating system until it is clear that there will be a sizeable and stable market for it. What is more, consumers who already use one Intel-compatible PC operating system are even less likely than first-time buyers to choose a newcomer to the field, for switching to a new system would require these users to scrap the investment they have made in applications, training, and certain hardware.

31. The chicken-and-egg problem notwithstanding, a firm might reasonably expect to make a profit by introducing an Intel-compatible PC operating system designed to support a type of application that satisfies the special interests of a particular subset of users. For example, Be, Inc. ('Be") markets an Intel-compatible PC operating system called BeOS that offers superior support for multimedia applications, and the operating system enjoys a certain amount of success with the segment of the consumer population that has a special interest in creating and playing multimedia content with a PC system. Still, while a niche operating system might turn a profit, the chicken-and-egg problem (hereinafter referred to as the "applications barrier to entry") would make it prohibitively expensive for a new Intel-compatible operating system to attract enough developers and consumers to become a viable alternative to a dominant incumbent in less than a few years.

32. To the extent that developers begin writing attractive applications that rely solely on servers or middleware instead of PC operating systems, the applications barrier to entry could erode. As the Court finds above, however, it remains to be seen whether server- or middleware-based development will flourish at all. Even if such development were already flourishing, it would still be several years before the applications barrier eroded enough

to clear the way for the relatively rapid emergence of a viable alternative to incumbent Intel-compatible PC operating systems. It is highly unlikely, then, that a firm not already marketing an Intel-compatible PC operating system could begin marketing one that would, in less than a few years, present a significant percentage of consumers with a viable alternative to incumbents.

III. MICROSOFT'S POWER IN THE RELEVANT MARKET

33. Microsoft enjoys so much power in the market for Intel-compatible PC operating systems that if it wished to exercise this power solely in terms of price, it could charge a price for Windows substantially above that which could be charged in a competitive market. Moreover, it could do so for a significant period of time without losing an unacceptable amount of business to competitors. In other words, Microsoft enjoys monopoly power in the relevant market.

34. Viewed together, three main facts indicate that Microsoft enjoys monopoly power. First, Microsoft's share of the market for Intel-compatible PC operating systems is extremely large and stable. Second, Microsoft's dominant market share is protected by a high barrier to entry. Third, and largely as a result of that barrier, Microsoft's customers lack a commercially viable alternative to Windows.

A. Market Share

35. Microsoft possesses a dominant, persistent, and increasing share of the worldwide market for Intel-compatible PC operating systems. Every year for the last decade, Microsoft's share of the market for Intel-compatible PC operating systems has stood above ninety percent. For the last couple of years, the figure has been at least ninety-five percent, and analysts project that the share will climb even higher over the next few years. Even if Apple's Mac

OS were included in the relevant market, Microsoft's share would still stand well above eighty percent.

B. The Applications Barrier to Entry

1. Description of the Applications Barrier to Entry

36. Microsoft's dominant market share is protected by the same barrier that helps define the market for Intel-compatible PC operating systems. As explained above, the applications barrier would prevent an aspiring entrant into the relevant market from drawing a significant number of customers away from a dominant incumbent even if the incumbent priced its products substantially above competitive levels for a significant period of time. Because Microsoft's market share is so dominant, the barrier has a similar effect within the market: It prevents Intel-compatible PC operating systems other than Windows from attracting significant consumer demand, and it would continue to do so even if Microsoft held its prices substantially above the competitive level.

37. Consumer interest in a PC operating system derives primarily from the ability of that system to run applications. The consumer wants an operating system that runs not only types of applications that he knows he will want to use, but also those types in which he might develop an interest later. Also, the consumer knows that if he chooses an operating system with enough demand to support multiple applications in each product category, he will be less likely to find himself straitened later by having to use an application whose features disappoint him. Finally, the average user knows that, generally speaking, applications improve through successive versions. He thus wants an operating system for which successive generations of his favorite applications will be released—promptly at that. The fact that a vastly larger number of applications are written for Windows than for other PC operating systems attracts

consumers to Windows, because it reassures them that their interests will be met as long as they use Microsoft's product.

38. Software development is characterized by substantial economies of scale. The fixed costs of producing software, including applications, is very high. By contrast, marginal costs are very low. Moreover, the costs of developing software are "sunk"—once expended to develop software, resources so devoted cannot be used for another purpose. The result of economies of scale and sunk costs is that application developers seek to sell as many copies of their applications as possible. An application that is written for one PC operating system will operate on another PC operating system only if it is ported to that system, and porting applications is both time-consuming and expensive. Therefore, application developers tend to write first to the operating system with the most users—Windows. Developers might then port their applications to other operating systems, but only to the extent that the marginal added sales justify the cost of porting. In order to recover that cost, ISVs that do go to the effort of porting frequently set the price of ported applications considerably higher than that of the original versions written for Windows.

39. Consumer demand for Windows enjoys positive network effects. A positive network effect is a phenomenon by which the attractiveness of a product increases with the number of people using it. The fact that there is a multitude of people using Windows makes the product more attractive to consumers. The large installed base attracts corporate customers who want to use an operating system that new employees are already likely to know how to use, and it attracts academic consumers who want to use software that will allow them to share files easily with colleagues at other institutions. The main reason that demand for Windows experiences positive network effects, however, is that the size of Windows' installed base impels ISVs to write applications first and foremost to Windows, thereby ensuring

a large body of applications from which consumers can choose. The large body of applications thus reinforces demand for Windows, augmenting Microsoft's dominant position and thereby perpetuating ISV incentives to write applications principally for Windows. This self-reinforcing cycle is often referred to as a "positive feedback loop."

40. What for Microsoft is a positive feedback loop is for would-be competitors a vicious cycle. For just as Microsoft's large market share creates incentives for ISVs to develop applications first and foremost for Windows, the small or non-existent market share of an aspiring competitor makes it prohibitively expensive for the aspirant to develop its PC operating system into an acceptable substitute for Windows. To provide a viable substitute for Windows, another PC operating system would need a large and varied enough base of compatible applications to reassure consumers that their interests in variety, choice, and currency would be met to more-or-less the same extent as if they chose Windows. Even if the contender attracted several thousand compatible applications, it would still look like a gamble from the consumer's perspective next to Windows, which supports over 70,000 applications. The amount it would cost an operating system vendor to create that many applications is prohibitively large. Therefore, in order to ensure the availability of a set of applications comparable to that available for Windows, a potential rival would need to induce a very large number of ISVs to write to its operating system.

41. In deciding whether to develop an application for a new operating system, an ISV's first consideration is the number of users it expects the operating system to attract. Out of this focus arises a collective-action problem: Each ISV realizes that the new operating system could attract a significant number of users if enough ISVs developed applications for it; but few ISVs want to sink resources into developing for the system until it becomes established. Since

everyone is waiting for everyone else to bear the risk of early adoption, the new operating system has difficulty attracting enough applications to generate a positive feedback loop. The vendor of a new operating system cannot effectively solve this problem by paying the necessary number of ISVs to write for its operating system, because the cost of doing so would dwarf the expected return.

42. Counteracting the collective-action phenomenon is another known as the "first-mover incentive." For an ISV interested in attracting users, there may be an advantage to offering the first and, for a while, only application in its category that runs on a new PC operating system. The user base of the new system may be small, but every user of that system who wants such an application will be compelled to use the ISV's offering. Moreover, if demand for the new operating system suddenly explodes, the first mover will reap large sales before any competitors arrive. An ISV thus might be drawn to a new PC operating system as a "protected harbor." Once first-movers stake claims to the major categories of applications, however, there is a strong chance that the new operating system could stall; it would not support the most familiar applications, nor the variety and number of applications, that attract large numbers of consumers, and there would no longer exist a first-mover incentive to attract additional ISVs to the important application categories. Although the upstart operating system might find itself with enough applications support to hold a fraction of the market, the collective-action phenomenon would still prevent the system from gaining the kind of positive feedback momentum that can turn a fringe entrant into a rival that would put competitive pressure on Windows.

43. The cost to a would-be entrant of inducing ISVs to write applications for its operating system exceeds the cost that Microsoft itself has faced in inducing ISVs to write applications for its operating system products, for Microsoft never confronted a highly penetrated market dominated by a

single competitor. Of course, the fact that it is extremely difficult for an efficient would-be rival to accumulate enough applications support to compete with Windows does not mean that sustaining its own applications support is effortless for Microsoft. In fact, if Microsoft stopped investing the hundreds of millions of dollars it spends each year inducing ISVs to write applications for Windows, it might become easier than it currently is for a competitor to develop its own positive feedback loop. But given that Windows today enjoys overwhelmingly more applications support than any other PC operating system, it would still take that competitor years to develop the necessary momentum. Plus, while Microsoft may spend more on platform "evangelization," even in relative terms, than any other PC operating-system vendor, it is not difficult to understand why it is worthwhile for the principal beneficiary of the applications barrier to devote more resources to augmenting it than aspiring rivals are willing to expend in speculative efforts to erode it.

44. Microsoft continually releases "new and improved" versions of its PC operating system. Each time it does, Microsoft must convince ISVs to write applications that take advantage of new APIs, so that existing Windows users will have incentive to buy an upgrade. Since ISVs are usually still earning substantial revenue from applications written for the last version of Windows, Microsoft must convince them to write for the new version. Even if ISVs are slow to take advantage of the new APIs, though, no applications barrier stands in the way of consumers adopting the new system, for Microsoft ensures that successive versions of Windows retain the ability to run applications developed for earlier versions. In fact, since ISVs know that consumers do not feel locked into their old versions of Windows and that new versions have historically attracted substantial consumer demand, ISVs will generally write to new APIs as long as the interfaces enable attractive, innovative features. Microsoft supplements developers'

incentives by extending various 'seals of approval'—visible to consumers, investors, and industry analysts—to those ISVs that promptly develop new versions of their applications adapted to the newest version of Windows. In addition, Microsoft works closely with ISVs to help them adapt their applications to the newest version of the operating system—a process that is in any event far easier than porting an application from one vendor's PC operating system to another's. In sum, despite the substantial resources Microsoft expends inducing ISVs to develop applications for new versions of Windows, the company does not face any obstacles nearly as imposing as the barrier to entry that vendors and would-be vendors of other PC operating systems must overcome.

2. Empirical Evidence of the Applications Barrier to Entry

45. The experiences of IBM and Apple, Microsoft's most significant operating system rivals in the mid- and late 1990s, confirm the strength of the applications barrier to entry.

a. OS/2 Warp

46. IBM's inability to gain widespread developer support for its OS/2 Warp operating system illustrates how the massive Windows installed base makes it prohibitively costly for a rival operating system to attract enough developer support to challenge Windows. In late 1994, IBM introduced its Intel-compatible OS/2 Warp operating system and spent tens of millions of dollars in an effort to attract ISVs to develop applications for OS/2 and in an attempt to reverse-engineer, or "clone," part of the Windows API set. Despite these efforts, IBM could obtain neither significant market share nor ISV support for OS/2 Warp. Thus, although at its peak OS/2 ran approximately 2,500 applications and had 10% of the market for Intel-compatible PC operating systems, IBM ultimately determined that the applications

barrier prevented effective competition against Windows 95. For that reason, in 1996 IBM stopped trying to convince ISVs to write for OS/2 Warp. IBM now targets the product at a market niche, namely enterprise customers (mainly banks) that are interested in particular types of application that run on OS/2 Warp. The fact that IBM no longer tries to compete with Windows is evidenced by the fact that it prices OS/2 Warp at about two-and-one-half times the price of Windows 98.

b. The Mac OS

47. The inability of Apple to compete effectively with Windows provides another example of the applications barrier to entry in operation. Although Apple's Mac OS supports more than 12,000 applications, even an inventory of that magnitude is not sufficient to enable Apple to present a significant percentage of users with a viable substitute for Windows. The absence of a large installed base, in turn, reinforces the disparity between the applications made available for the Mac OS and those made available for Windows, further inhibiting Apple's sales. The applications barrier thus prevents the Mac OS from hindering Microsoft's ability to control price, regardless of whether the Mac OS is regarded as being in the relevant market or not.

c. Fringe Operating Systems

48. The applications barrier to entry does not prevent non-Microsoft, Intel-compatible PC operating systems from attracting enough consumer demand and ISV support to survive. It does not even prevent vendors of those products from making a profit. The barrier does, however, prevent the products from drawing a significant percentage of consumers away from Windows.

49. As discussed above, Be markets an Intel-compatible PC operating system, called BeOS, that is specially suited to support multimedia functions. The operating system survives on a relatively minuscule number

of applications (approximately 1,000) and a user base which, at around 750,000, is trivial compared to the number of Windows users. One of the reasons BeOS can even attract that many users despite its small base of applications is that it advertises itself as a complement to, rather than as a substitute for, Windows. Although BeOS could run an Intel-compatible PC system without Windows, it is almost always loaded on a system along with Windows. What is more, when these dual-loaded PC systems are turned on, Windows automatically boots; the user must then take affirmative steps to invoke BeOS. While this scheme allows BeOS to occupy a niche in the market, it does not place the product on a trajectory to replace Windows on a significant number of PCs. The special multimedia support provided by BeOS may, for a small number of users, outweigh the disadvantages of maintaining two large, complex operating systems on one PC. Of that group, however, it is likely that only a tiny number of users will find that support so attractive that they would be willing to forego Windows, and its huge base of compatible applications, altogether.

50. The experience of the Linux operating system, a version of which runs on Intel-compatible PCs, similarly fails to refute the existence of an applications barrier to entry. Linux is an "open source" operating system that was created, and is continuously updated, by a global network of software developers who contribute their labor for free. Although Linux has between ten and fifteen million users, the majority of them use the operating system to run servers, not PCs. Several ISVs have announced their development of (or plans to develop) Linux versions of their applications. To date, though, legions of ISVs have not followed the lead of these first movers. Similarly, consumers have by and large shown little inclination to abandon Windows, with its reliable developer support, in favor of an operating system whose future in the PC realm is unclear. By itself, Linux's open-source development model shows no signs of liberating that operating system from the cycle of consumer

preferences and developer incentives that, when fueled by Windows' enormous reservoir of applications, prevents non-Microsoft operating systems from competing.

3. Open-Source Applications Development

51. Since application developers working under an open-source model are not looking to recoup their investment and make a profit by selling copies of their finished products, they are free from the imperative that compels proprietary developers to concentrate their efforts on Windows. In theory, then, open-source developers are at least as likely to develop applications for a non-Microsoft operating system as they are to write Windows-compatible applications. In fact, they may be disposed ideologically to focus their efforts on open-source platforms like Linux. Fortunately for Microsoft, however, there are only so many developers in the world willing to devote their talents to writing, testing, and debugging software pro bono publico. A small corps may be willing to concentrate its efforts on popular applications, such as browsers and office productivity applications, that are of value to most users. It is unlikely, though, that a sufficient number of open-source developers will commit to developing and continually updating the large variety of applications that an operating system would need to attract in order to present a significant number of users with a viable alternative to Windows. In practice, then, the open-source model of applications development may increase the base of applications that run on non-Microsoft PC operating systems, but it cannot dissolve the barrier that prevents such operating systems from challenging Windows.

4. Cloning the 32-Bit Windows APIs

52. Theoretically, the developer of a non-Microsoft, Intel-compatible PC operating system could circumvent the applications barrier to entry by cloning the APIs exposed by

the 32-bit versions of Windows (Windows 9x and Windows NT). Applications written for Windows would then also run on the rival system, and consumers could use the rival system confident in that knowledge. Translating this theory into practice is virtually impossible, however. First of all, cloning the thousands of APIs already exposed by Windows would be an enormously expensive undertaking. More daunting is the fact that Microsoft continually adds APIs to Windows through updates and new versions. By the time a rival finished cloning the APIs currently in existence, Windows would have exposed a multitude of new ones. Since the rival would never catch up, it would never be able to assure consumers that its operating system would run all of the applications written for Windows. IBM discovered this to its dismay in the mid-1990s when it failed, despite a massive investment, to clone a sufficiently large part of the 32-bit Windows APIs. In short, attempting to clone the 32-bit Windows APIs is such an expensive, uncertain undertaking that it fails to present a practical option for a would-be competitor to Windows.

C. Viable Alternatives to Windows

53. That Microsoft's market share and the applications barrier to entry together endow the company with monopoly power in the market for Intel-compatible PC operating systems is directly evidenced by the sustained absence of realistic commercial alternatives to Microsoft's PC operating-system products.

54. OEMs are the most important direct customers for operating systems for Intel-compatible PCs. Because competition among OEMs is intense, they pay particularly close attention to consumer demand. OEMs are thus not only important customers in their own right, they are also surrogates for consumers in identifying reasonably-available commercial alternatives to Windows. Without significant exception, all OEMs pre-install Windows on the vast majority of PCs that they sell, and they uniformly are of a

mind that there exists no commercially viable alternative to which they could switch in response to a substantial and sustained price increase or its equivalent by Microsoft. For example, in 1995, at a time when IBM still placed hope in OS/2's ability to rival Windows, the firm nevertheless calculated that its PC company would lose between seventy and ninety percent of its sales volume if it failed to load Windows 95 on its PCs. Although a few OEMs have announced their intention to pre-install Linux on some of the computers they ship, none of them plan to install Linux in lieu of Windows on any appreciable number of PC (as opposed to server) systems. For its part, Be is not even attempting to persuade OEMs to install BeOS on PCs to the exclusion of Windows.

55. OEMs believe that the likelihood of a viable alternative to Windows emerging any time in the next few years is too low to constrain Microsoft from raising prices or imposing other burdens on customers and users. The accuracy of this belief is highlighted by the fact that the other vendors of Intel-compatible PC operating systems do not view their own offerings as viable alternatives to Windows. Microsoft knows that OEMs have no choice but to load Windows, both because it has a good understanding of the market in which it operates and because OEMs have told Microsoft as much. Indicative of Microsoft's assessment of the situation is the fact that, in a 1996 presentation to the firm's executive committee, the Microsoft executive in charge of OEM licensing reported that piracy continued to be the main competition to the company's operating system products. Secure in this knowledge, Microsoft did not consider the prices of other Intel-compatible PC operating systems when it set the price of Windows 98.

56. As the Court found above, the growth of server- and middleware-based applications development might eventually weaken the applications barrier to entry. This would not only make it easier for outside firms to enter the

market, it could also make it easier for non-Microsoft firms already in the market to present a viable alternative to Windows. But as the Court also found above, it is not clear whether ISVs will ever develop a large, diverse body of full-featured applications that rely solely on APIs exposed by servers and middleware. Furthermore, even assuming that such a movement has already begun in earnest, it will take several years for the applications barrier to erode enough to enable a non-Microsoft, Intel-compatible PC operating system to develop into a viable alternative to Windows.

D. Price Restraint Posed by Microsoft's Installed Base

57. Software never expires, so consumers who already have a version of Windows with which they are content and who are not shopping for a new PC system are somewhat reluctant to incur the cost of upgrading to a new version of Windows. Fortunately for Microsoft, the pace of innovation in PC hardware is rapid, and the price of that hardware has declined steadily in recent years. As a result, existing PC users buy new PC systems relatively frequently, and OEMs still attract at a healthy rate buyers who have never owned a computer. The license for one of Microsoft's operating system products prohibits the user from transferring the operating system to another machine, so there is no legal secondary market in Microsoft operating systems. This means that any consumer who buys a new Intel-compatible PC and wants Windows must buy a new copy of the operating system. Microsoft takes pains to ensure that the versions of its operating system that OEMs pre-install on new PC systems are the most current. It does this, in part, by increasing the price to OEMs of older versions of Windows when the newer versions are released. Since Microsoft can sell so many copies of each new operating system through the sales of new PC systems, the average price it sets for those systems is little affected by the fact that older versions of Windows never wear out.

E. Price Restraint Posed by Piracy

58. Although there is no legal secondary market for Microsoft's PC operating systems, there is a thriving illegal one. Software pirates illegally copy software products such as Windows, selling each copy for a fraction of the vendor's usual price. One of the ways Microsoft combats piracy is by advising OEMs that they will be charged a higher price for Windows unless they drastically limit the number of PCs that they sell without an operating system pre-installed. In 1998, all major OEMs agreed to this restriction. Naturally, it is hard to sell a pirated copy of Windows to a consumer who has already received a legal copy included in the price of his new PC system. Thus, Microsoft is able to effectively contain, if not extinguish, the illegal secondary market for its operating-system products. So even though Microsoft is more concerned about piracy than it is about other firms' operating-system products, the company's pricing is not substantially constrained by the need to reduce the incentives for consumers to acquire their copies of Windows illegally.

F. Price Restraint Posed by Long-Term Threats

59. The software industry in general is characterized by dynamic, vigorous competition. In many cases, one of the early entrants into a new software category quickly captures a lion's share of the sales, while other products in the category are either driven out altogether or relegated to niche positions. What eventually displaces the leader is often not competition from another product within the same software category, but rather a technological advance that renders the boundaries defining the category obsolete. These events, in which categories are redefined and leaders are superseded in the process, are spoken of as "inflection points."

60. The exponential growth of the Internet represents an inflection point born of complementary technological advances in the computer and telecommunications industries.

The rise of the Internet in turn has fueled the growth of server-based computing, middleware, and open-source software development. Working together, these nascent paradigms could oust the PC operating system from its position as the primary platform for applications development and the main interface between users and their computers. Microsoft recognizes that new paradigms could arise to depreciate the value of selling PC operating systems; however, the fact that these new paradigms already exist in embryonic or primitive form does not prevent Microsoft from enjoying monopoly power today. For while consumers might one day turn to network computers, or Linux, or a combination of middleware and some other operating system, as an alternative to Windows, the fact remains that they are not doing so today. Nor are consumers likely to do so in appreciable numbers any time in the next few years. Unless and until that day arrives, no significant percentage of consumers will be able to abandon Windows without incurring substantial costs. Microsoft can therefore set the price of Windows substantially higher than that which would be charged in a competitive market—or impose other burdens on consumers—without losing so much business as to make the action unprofitable. If Microsoft exerted its power solely to raise price, the day when users could turn away from Windows without incurring substantial costs would still be several years distant. Moreover, Microsoft could keep its prices high for a significant period of time and still lower them in time to meet the threat of a new paradigm. Alternatively, Microsoft could delay the arrival of a new paradigm on the scene by expending surplus monopoly power in ways other than the maintenance of high prices.

G. Significance of Microsoft's Innovation

61. The fact that Microsoft invests heavily in research and development does not evidence a lack of monopoly power. Indeed, Microsoft has incentives to innovate aggressively despite its monopoly power. First, if

there are innovations that will make Intel-compatible PC systems attractive to more consumers, and those consumers less sensitive to the price of Windows, the innovations will translate into increased profits for Microsoft. Second, although Microsoft could significantly restrict its investment in innovation and still not face a viable alternative to Windows for several years, it can push the emergence of competition even farther into the future by continuing to innovate aggressively. While Microsoft may not be able to stave off all potential paradigm shifts through innovation, it can thwart some and delay others by improving its own products to the greater satisfaction of consumers.

H. Microsoft's Pricing Behavior

62. Microsoft's actual pricing behavior is consistent with the proposition that the firm enjoys monopoly power in the market for Intel-compatible PC operating systems. The company's decision not to consider the prices of other vendors' Intel-compatible PC operating systems when setting the price of Windows 98, for example, is probative of monopoly power. One would expect a firm in a competitive market to pay much closer attention to the prices charged by other firms in the market. Another indication of monopoly power is the fact that Microsoft raised the price that it charged OEMs for Windows 95, with trivial exceptions, to the same level as the price it charged for Windows 98 just prior to releasing the newer product. In a competitive market, one would expect the price of an older operating system to stay the same or decrease upon the release of a newer, more attractive version. Microsoft, however, was only concerned with inducing OEMs to ship Windows 98 in favor of the older version. It is unlikely that Microsoft would have imposed this price increase if it were genuinely concerned that OEMs might shift their business to another vendor of operating systems or hasten the development of viable alternatives to Windows.

63. Finally, it is indicative of monopoly power that Microsoft felt that it had substantial discretion in setting the price of its Windows 98 upgrade product (the operating system product it sells to existing users of Windows 95). A Microsoft study from November 1997 reveals that the company could have charged $49 for an upgrade to Windows 98—there is no reason to believe that the $49 price would have been unprofitable—but the study identifies $89 as the revenue-maximizing price. Microsoft thus opted for the higher price.

64. An aspect of Microsoft's pricing behavior that, while not tending to prove monopoly power, is consistent with it is the fact that the firm charges different OEMs different prices for Windows, depending on the degree to which the individual OEMs comply with Microsoft's wishes. Among the five largest OEMs, Gateway and IBM, which in various ways have resisted Microsoft's efforts to enlist them in its efforts to preserve the applications barrier to entry, pay higher prices than Compaq, Dell, and Hewlett-Packard, which have pursued less contentious relationships with Microsoft.

65. It is not possible with the available data to determine with any level of confidence whether the price that a profit-maximizing firm with monopoly power would charge for Windows 98 comports with the price that Microsoft actually charges. Even if it could be determined that Microsoft charges less than the profit-maximizing monopoly price, though, that would not be probative of a lack of monopoly power, for Microsoft could be charging what seems like a low short-term price in order to maximize its profits in the future for reasons unrelated to underselling any incipient competitors. For instance, Microsoft could be stimulating the growth of the market for Intel-compatible PC operating systems by keeping the price of Windows low today. Given the size and stability of its market share, Microsoft stands to reap almost all of the future rewards if

there are yet more consumers of Intel-compatible PC operating systems. By pricing low relative to the short-run profit-maximizing price, thereby focusing on attracting new users to the Windows platform, Microsoft would also intensify the positive network effects that add to the impenetrability of the applications barrier to entry.

66. Furthermore, Microsoft expends a significant portion of its monopoly power, which could otherwise be spent maximizing price, on imposing burdensome restrictions on its customers—and in inducing them to behave in ways—that augment and prolong that monopoly power. For example, Microsoft attaches to a Windows license conditions that restrict the ability of OEMs to promote software that Microsoft believes could weaken the applications barrier to entry. Microsoft also charges a lower price to OEMs who agree to ensure that all of their Windows machines are powerful enough to run Windows NT for Workstations. To the extent this provision induces OEMs to concentrate their efforts on the development of relatively powerful, expensive PCs, it makes OEMs less likely to pursue simultaneously the opposite path of developing "thin client" systems, which could threaten demand for Microsoft's Intel-compatible PC operating-system products. In addition, Microsoft charges a lower price to OEMs who agree to ship all but a minute fraction of their machines with an operating system pre-installed. While this helps combat piracy, it also makes it less likely that consumers will detect increases in the price of Windows and renders operating systems not pre-installed by OEMs in large numbers even less attractive to consumers. After all, a consumer's interest in a non-Windows operating system might not outweigh the burdens on system memory and performance associated with supporting two operating systems on a single PC. Other such restrictions and incentives are described below.

I. Microsoft's Actions Toward Other Firms

67. Microsoft's monopoly power is also evidenced by the fact that, over the course of several years, Microsoft took actions that could only have been advantageous if they operated to reinforce monopoly power. These actions are described below.

IV. THE MIDDLEWARE THREATS

68. Middleware technologies, as previously noted, have the potential to weaken the applications barrier to entry. Microsoft was apprehensive that the APIs exposed by middleware technologies would attract so much developer interest, and would become so numerous and varied, that there would arise a substantial and growing number of full-featured applications that relied largely, or even wholly, on middleware APIs. The applications relying largely on middleware APIs would potentially be relatively easy to port from one operating system to another. The applications relying exclusively on middleware APIs would run, as written, on any operating system hosting the requisite middleware. So the more popular middleware became and the more APIs it exposed, the more the positive feedback loop that sustains the applications barrier to entry would dissipate. Microsoft was concerned with middleware as a category of software; each type of middleware contributed to the threat posed by the entire category. At the same time, Microsoft focused its antipathy on two incarnations of middleware that, working together, had the potential to weaken the applications barrier severely without the assistance of any other middleware. These were Netscape's Web browser and Sun's implementation of the Java technologies.

A. The Netscape Web Browser

69. Netscape Navigator possesses three key middleware attributes that endow it with the potential to diminish the applications barrier to entry. First, in contrast to

non-Microsoft, Intel-compatible PC operating systems, which few users would want to use on the same PC systems that carry their copies of Windows, a browser can gain widespread use based on its value as a complement to Windows. Second, because Navigator exposes a set (albeit a limited one) of APIs, it can serve as a platform for other software used by consumers. A browser product is particularly well positioned to serve as a platform for network-centric applications that run in association with Web pages. Finally, Navigator has been ported to more than fifteen different operating systems. Thus, if a developer writes an application that relies solely on the APIs exposed by Navigator, that application will, without any porting, run on many different operating systems.

70. Adding to Navigator's potential to weaken the applications barrier to entry is the fact that the Internet has become both a major inducement for consumers to buy PCs for the first time and a major occupier of the time and attention of current PCs users. For any firm looking to turn its browser product into an applications platform such to rival Windows, the intense consumer interest in all things Internet-related is a great boon.

71. Microsoft knew in the fall of 1994 that Netscape was developing versions of a Web browser to run on different operating systems. It did not yet know, however, that Netscape would employ Navigator to generate revenue directly, much less that the product would evolve in such a way as to threaten Microsoft. In fact, in late December 1994, Netscape's chairman and chief executive officer ("CEO"), Jim Clark, told a Microsoft executive that the focus of Netscape's business would be applications running on servers and that Netscape did not intend to succeed at Microsoft's expense.

72. As soon as Netscape released Navigator on December 15, 1994, the product began to enjoy dramatic acceptance by the public; shortly after its release, consumers

were already using Navigator far more than any other browser product. This alarmed Microsoft, which feared that Navigator's enthusiastic reception could embolden Netscape to develop Navigator into an alternative platform for applications development. In late May 1995, Bill Gates, the chairman and CEO of Microsoft, sent a memorandum entitled "The Internet Tidal Wave" to Microsoft's executives describing Netscape as a "new competitor 'born' on the Internet." He warned his colleagues within Microsoft that Netscape was "pursuing a multi-platform strategy where they move the key API into the client to commoditize the underlying operating system." By the late spring of 1995, the executives responsible for setting Microsoft's corporate strategy were deeply concerned that Netscape was moving its business in a direction that could diminish the applications barrier to entry.

B. Sun's Implementation of the Java Technologies

73. The term "Java" refers to four interlocking elements. First, there is a Java programming language with which developers can write applications. Second, there is a set of programs written in Java that expose APIs on which developers writing in Java can rely. These programs are called the "Java class libraries." The third element is the Java compiler, which translates the code written by the developer into Java "bytecode." Finally, there are programs called "Java virtual machines," or "JVMs," which translate Java bytecode into instructions comprehensible to the underlying operating system. If the Java class libraries and a JVM are present on a PC system, the system is said to carry a "Java runtime environment."

74. The inventors of Java at Sun Microsystems intended the technology to enable applications written in the Java language to run on a variety of platforms with minimal porting. A program written in Java and relying only on APIs exposed by the Java class libraries will run on any PC system

containing a JVM that has itself been ported to the resident operating system. Therefore, Java developers need to port their applications only to the extent that those applications rely directly on the APIs exposed by a particular operating system. The more an application written in Java relies on APIs exposed by the Java class libraries, the less work its developer will need to do to port the application to different operating systems. The easier it is for developers to port their applications to different operating systems, the more applications will be written for operating systems other than Windows. To date, the Java class libraries do not expose enough APIs to support the development of full-featured applications that will run well on multiple operating systems without the need for porting; however, they do allow relatively simple, network-centric applications to be written cross-platform. It is Sun's ultimate ambition to expand the class libraries to such an extent that many full-featured, end-user-oriented applications will be written cross-platform. The closer Sun gets to this goal of "write once, run anywhere," the more the applications barrier to entry will erode.

75. Sun announced in May 1995 that it had developed the Java programming language. Mid-level executives at Microsoft began to express concern about Sun's Java vision in the fall of that year, and by late spring of 1996, senior Microsoft executives were deeply worried about the potential of Sun's Java technologies to diminish the applications barrier to entry.

76. Sun's strategy could only succeed if a Java runtime environment that complied with Sun's standards found its way onto PC systems running Windows. Sun could not count on Microsoft to ship with Windows an implementation of the Java runtime environment that threatened the applications barrier to entry. Fortunately for Sun, Netscape agreed in May 1995 to include a copy of Sun's Java runtime environment with every copy of Navigator, and Navigator quickly became the principal

vehicle by which Sun placed copies of its Java runtime environment on the PC systems of Windows users.

77. The combined efforts of Netscape and Sun threatened to hasten the demise of the applications barrier to entry, opening the way for non-Microsoft operating systems to emerge as acceptable substitutes for Windows. By stimulating the development of network-centric Java applications accessible to users through browser products, the collaboration of Netscape and Sun also heralded the day when vendors of information appliances and network computers could present users with viable alternatives to PCs themselves. Nevertheless, these middleware technologies have a long way to go before they might imperil the applications barrier to entry. Windows 98 exposes nearly ten thousand APIs, whereas the combined APIs of Navigator and the Java class libraries, together representing the greatest hope for proponents of middleware, total less than a thousand. Decision-makers at Microsoft are apprehensive of potential as well as present threats, though, and in 1995 the implications of the symbiosis between Navigator and Sun's Java implementation were not lost on executives at Microsoft, who viewed Netscape's cooperation with Sun as a further reason to dread the increasing use of Navigator.

C. Other Middleware Threats

78. Although they have been the most prominent, Netscape's Navigator and Sun's Java implementation are not the only manifestations of middleware that Microsoft has perceived as having the potential to weaken the applications barrier to entry. Starting in 1994, Microsoft exhibited considerable concern over the software product Notes, distributed first by Lotus and then by IBM. Microsoft worried about Notes for several reasons: It presented a graphical interface that was common across multiple operating systems; it also exposed a set of APIs to developers; and, like Navigator, it served as a distribution vehicle for Sun's Java runtime environment. Then in 1995,

Microsoft reacted with alarm to Intel's Native Signal Processing software, which interacted with the microprocessor independently of the operating system and exposed APIs directly to developers of multimedia content. Finally, in 1997 Microsoft noted the dangers of Apple's and RealNetworks' multimedia playback technologies, which ran on several platforms (including the Mac OS and Windows) and similarly exposed APIs to content developers. Microsoft feared all of these technologies because they facilitated the development of user-oriented software that would be indifferent to the identity of the underlying operating system.

V. MICROSOFT'S RESPONSE TO THE BROWSER THREAT

A. Microsoft's Attempt to Dissuade Netscape from Developing Navigator as a Platform

79. Microsoft's first response to the threat posed by Navigator was an effort to persuade Netscape to structure its business such that the company would not distribute platform-level browsing software for Windows. Netscape's assent would have ensured that, for the foreseeable future, Microsoft would produce the only platform-level browsing software distributed to run on Windows. This would have eliminated the prospect that non-Microsoft browsing software could weaken the applications barrier to entry.

80. Executives at Microsoft received confirmation in early May 1995 that Netscape was developing a version of Navigator to run on Windows 95, which was due to be released in a couple of months. Microsoft's senior executives understood that if they could prevent this version of Navigator from presenting alternatives to the Internet-related APIs in Windows 95, the technologies branded as Navigator would cease to present an alternative platform to developers. Even if non-Windows versions of Navigator exposed Internet-related APIs, applications written to those APIs would not run on the platform Microsoft executives expected

to enjoy the largest installed base, i.e., Windows 95. So, as long as the version of Navigator written for Windows 95 relied on Microsoft's Internet-related APIs instead of exposing its own, developing for Navigator would not mean developing cross-platform. Developers of network-centric applications thus would not be drawn to Navigator's APIs in substantial numbers. Therefore, with the encouragement and support of Gates, a group of Microsoft executives commenced a campaign in the summer of 1995 to convince Netscape to halt its development of platform-level browsing technologies for Windows 95.

81. In a meeting held at Microsoft's headquarters on June 2, 1995, Microsoft executives suggested to Jim Clark's replacement as CEO at Netscape, James Barksdale, that the version of Navigator written for Windows 95 be designed to rely upon the Internet-related APIs in Windows 95 and distinguish itself with "value-added" software components. The Microsoft executives left unsaid the fact that value-added software, by definition, does not present a significant platform for applications development. For his part, Barksdale informed the Microsoft representatives that the browser represented an important part of Netscape's business strategy and that Windows 3.1 and Windows 95 were expected to be the primary platforms for which Navigator would be distributed.

82. At the conclusion of the June 2 meeting, Microsoft still did not know whether or not Netscape intended to preserve Navigator's platform capabilities and expand the set of APIs that it exposed to developers. In the hope that Netscape could still be persuaded to forswear any platform ambitions and instead rely on the Internet technologies in Windows 95, Microsoft accepted Barksdale's invitation to send a group of representatives to Netscape's headquarters for a technology "brainstorming session" on June 21. Netscape's senior executives saw the meeting as an opportunity to ask Microsoft for access to crucial technical

information, including certain APIs, that Netscape needed in order to ensure that Navigator would work well on systems running Windows 95.

83. Early in the June 21 meeting, Microsoft representatives told Barksdale and the other Netscape executives present that they wanted to explore the possibility of building a broader and closer relationship between the two companies. To this end, the Microsoft representatives wanted to know whether Netscape intended to adopt and build on top of the Internet-related platform that Microsoft planned to include in Windows 95, or rather to expose its own Internet-related APIs, which would compete with Microsoft's. If Netscape was not committed to providing an alternative platform for network-centric applications, Microsoft would assist Netscape in developing server- and (to a limited extent) PC-based software applications that relied on Microsoft's Internet technologies. For one thing, the representatives explained, Microsoft would be content to leave the development of browser products for the Mac OS, UNIX, and Microsoft's 16-bit operating system products to Netscape. Alternatively, Netscape could license to Microsoft the underlying code for a Microsoft-branded browser to run on those platforms. The Microsoft representatives made it clear, however, that Microsoft would be marketing its own browser for Windows 95, and that this product would rely on Microsoft's platform-level Internet technologies. If Netscape marketed browsing software for Windows 95 based on different technologies, then Microsoft would view Netscape as a competitor, not a partner.

84. When Barksdale brought the discussion back to the particular Windows 95 APIs that Netscape actually wanted to rely on and needed from Microsoft, the representatives from Microsoft explained that if Netscape entered a "special relationship" with Microsoft, the company would treat Netscape as a "preferred ISV." This meant that Netscape would enjoy preferential access to technical

information, including APIs. They intimated that Microsoft's internal developers had already created the APIs that Netscape was seeking, and that Microsoft had not yet decided either which ISVs would be privileged to receive them or when access would be granted. The Microsoft representatives made clear that the alacrity with which Netscape would receive the desired Windows 95 APIs and other technical information would depend on whether Netscape entered this "special relationship" with Microsoft.

85. After listening to Microsoft's proposal, Barksdale had two main questions: First, where would the line between platform (Microsoft's exclusive domain) and applications (where Netscape could continue to function) be situated? Second, who would get to decide where the line would lie? After all, the attractiveness of a special relationship with Microsoft depended a great deal on how much room would remain for Netscape to innovate and seek profit. The Microsoft representatives replied that Microsoft would incorporate most of the functionality of the current Netscape browser into the Windows 95 platform, perhaps leaving room for Netscape to distribute a user-interface shell. Where Netscape would have the most scope to innovate would be in the development of software "solutions," which are applications (mainly server-based) focused on meeting the needs of specific types of commercial users. Since such applications are already minutely calibrated to the needs of their users, they do not present platforms for the development of more specific applications. Although the representatives from Microsoft assured Barksdale that the line between platform and solutions was fixed by a collaborative decision-making process between Microsoft and its ISV partners, those representatives had already indicated that the space Netscape would be allowed to occupy between the user and Microsoft's platform domain was a very narrow one. Simply put, if Navigator exposed APIs that competed for developer attention with the Internet-related APIs Microsoft was planning to build into its

platform, Microsoft would regard Netscape as a trespasser on its territory.

86. The Microsoft representatives did not insist at the June 21 meeting that Netscape accept their proposal on the spot. For his part, Barksdale said only that he would like more information regarding where Microsoft proposed to place the line between its platform and Netscape's applications. In the ensuing, more technical discussions, the Netscape executives agreed to adopt one component of Microsoft's platform-level Internet technology called Internet Shortcuts. The meeting ended cordially, with both sides promising to keep the lines of communication open.

87. The executive who led Microsoft's contingent on June 21, Daniel Rosen, emerged from the meeting optimistic that Netscape would abandon its platform ambitions in exchange for special help from Microsoft in developing solutions. His sentiments were not shared by another Microsoft participant, Thomas Reardon, who had not failed to notice the Netscape executives grow tense when the Microsoft representatives referred to incorporating Navigator's functionality into Windows. Reardon predicted that Netscape would compete with almost all of Microsoft's platform-level Internet technologies. Once he heard both viewpoints, Gates concluded that Rosen was being a bit naive and that Reardon had assessed the situation more accurately. In the middle of July 1995, Rosen's superiors instructed him to drop the effort to reach a strategic concord with Netscape.

88. Had Netscape accepted Microsoft's proposal, it would have forfeited any prospect of presenting a comprehensive platform for the development of network-centric applications. Even if the versions of Navigator written for the Mac OS, UNIX, and 16-bit Windows had continued to expose APIs controlled by Netscape, the fact that Netscape would not have marketed any platform software for Windows 95, the operating system that was

destined to become dominant, would have ensured that, for the foreseeable future, too few developers would rely on Navigator's APIs to create a threat to the applications barrier to entry. In fact, although the discussions ended before Microsoft was compelled to demarcate precisely where the boundary between its platform and Netscape's applications would lie, it is unclear whether Netscape's acceptance of Microsoft's proposal would have left the firm with even the ability to survive as an independent business.

89. At the time Microsoft presented its proposal, Navigator was the only browser product with a significant share of the market and thus the only one with the potential to weaken the applications barrier to entry. Thus, had it convinced Netscape to accept its offer of a "special relationship," Microsoft quickly would have gained such control over the extensions and standards that network-centric applications (including Web sites) employ as to make it all but impossible for any future browser rival to lure appreciable developer interest away from Microsoft's platform.

B. Withholding Crucial Technical Information

90. Microsoft knew that Netscape needed certain critical technical information and assistance in order to complete its Windows 95 version of Navigator in time for the retail release of Windows 95. Indeed, Netscape executives had made a point of requesting this information, especially the so-called Remote Network Access ("RNA") API, at the June 21 meeting. As was discussed above, the Microsoft representatives at the meeting had responded that the haste with which Netscape received the desired technical information would depend on whether Netscape entered the so-called "special relationship" with Microsoft. Specifically, Microsoft representative J. Allard had told Barksdale that the way in which the two companies concluded the meeting

would determine whether Netscape received the RNA API immediately or in three months.

91. Although Netscape declined the special relationship with Microsoft, its executives continued, over the weeks following the June 21 meeting, to plead for the RNA API. Despite Netscape's persistence, Microsoft did not release the API to Netscape until late October, *i.e.*, as Allard had warned, more than three months later. The delay in turn forced Netscape to postpone the release of its Windows 95 browser until substantially after the release of Windows 95 (and Internet Explorer) in August 1995. As a result, Netscape was excluded from most of the holiday selling season.

92. Microsoft similarly withheld a scripting tool that Netscape needed to make its browser compatible with certain dial-up ISPs. Microsoft had licensed the tool freely to ISPs that wanted it, and in fact had cooperated with Netscape in drafting a license agreement that, by mid-July 1996, needed only to be signed by an authorized Microsoft executive to go into effect. There the process halted, however. In mid-August, a Microsoft representative informed Netscape that senior executives at Microsoft had decided to link the grant of the license to the resolution of all open issues between the companies. Netscape never received a license to the scripting tool and, as a result, was unable to do business with certain ISPs for a time.

C. The Similar Experiences of Other Firms in Dealing with Microsoft

93. Other firms in the computer industry have had encounters with Microsoft similar to the experiences of Netscape described above. These interactions demonstrate that it is Microsoft's corporate practice to pressure other firms to halt software development that either shows the potential to weaken the applications barrier to entry or competes directly with Microsoft's most cherished software products.

1. Intel

94. At the same time that Microsoft was trying to convince Netscape to stop developing cross-platform APIs, it was trying to convince Intel to halt the development of software that presented developers with a set of operating-system-independent interfaces.

95. Although Intel is engaged principally in the design and manufacture of microprocessors, it also develops some software. Intel's software development efforts, which take place at the Intel Architecture Labs ("IAL"), are directed primarily at finding useful ways to consume more microprocessor cycles, thereby stimulating demand for advanced Intel microprocessors. By early 1995, IAL was in the advanced stages of developing software that would enable Intel 80x86 microprocessors to carry out tasks usually performed by separate chips known as "digital signal processors." By enabling this migration, the software, called Native Signal Processing ("NSP") software, would endow Intel microprocessors with substantially enhanced video and graphics performance.

96. Intel was eager for software developers and hardware manufacturers to write software and build peripheral devices that would implement the enhanced capabilities that its microprocessors and its NSP software together offered. Intel did not believe, however, that the set of APIs and device driver interfaces ("DDIs") in Windows had kept pace with the growing ability of Intel's microprocessors to deliver audio/visual content. Consequently, IAL designed its NSP software to expose Intel's own APIs and DDIs that, when invoked by developers and hardware manufacturers, would demonstrate the multimedia capabilities of an Intel microprocessor utilizing NSP.

97. Microsoft reacted to Intel's NSP software with alarm. First of all, the software threatened to offer ISVs and

device manufacturers an alternative to waiting for Windows to provide system-level support for products that would take advantage of advances in hardware technology. More troubling was the fact that Intel was developing versions of its NSP software for non-Microsoft operating systems. The different versions of the NSP software exposed the same set of software interfaces to developers, so the more an application took advantage of interfaces exposed by NSP software, the easier it would be to port that application to non-Microsoft operating systems. In short, Intel's NSP software bore the potential to weaken the barrier protecting Microsoft's monopoly power.

98. Over time, Microsoft developed additional qualms about Intel's NSP software. For instance, Intel initially designed the NSP software to be compatible with only Windows 3.1. At the time, Microsoft was preparing to release Windows 95, and the company did not want anything rekindling the interest of ISVs, equipment manufacturers, and consumers in the soon-to-be obsolescent version of Windows. More acute was Microsoft's concern that users who received NSP software on their Windows 3.1 systems would have difficulty upgrading those systems to Windows 95. By June 1995, Intel had completed a pre-release, or "beta," version of its NSP software for Windows 95, but Microsoft worried that a commercial version would not be ready by the time OEMs began loading Windows 95.

99. Along with its concerns about contemporaneous compatibility, Microsoft also complained that Intel had not subjected its software to sufficient quality-assurance testing. Microsoft was quick to point out that if Windows users detected problems with the software that came pre-installed on their PC systems, they would blame Microsoft or the OEMs, even if fault lay with Intel. Microsoft's concerns with compatibility and quality were genuine. Both pre-dating and over-shadowing these transient and remediable concerns, however, was a more abiding fear at Microsoft that the NSP

software would render ISVs, device manufacturers, and (ultimately) consumers less dependent on Windows. Without this fear, Microsoft would not have subjected Intel to the level of pressure that it brought to bear in the summer of 1995.

100. Microsoft began complaining to Intel about its NSP software in inter-company communications sent in the spring of 1995. In May, Microsoft raised the profile of its complaints by sending some of its senior executives to Intel to discuss the latter's incursion into Microsoft's platform territory. Returning from the May meeting, one Microsoft employee urged his superiors to refuse to allow Intel to offer platform-level software, even if it meant that Intel could not innovate as quickly as it would like. If Intel wished to enable a new function, the employee wrote, its only "winning path" would be to convince Microsoft to support the effort in its platform software. At any rate, "[s]ometimes Intel would have to accept the outcome that the time isn't right for [Microsoft]." In the first week of July, Gates himself met with Intel's CEO, Andrew Grove, to discuss, among other things, NSP. In a subsequent memorandum to senior Microsoft executives, Gates reported that he had tried to convince Grove "to basically not ship NSP" and more generally to reduce the number of people working on software at Intel.

101. The development of an alternative platform to challenge Windows was not the primary objective of Intel's NSP efforts. In fact, Intel was interested in providing APIs and DDIs only to the extent the effort was necessary to ensure the development of applications and devices that would spark demand for Intel's most advanced microprocessors. Understanding Intel's limited ambitions, Microsoft hastened to assure Intel that if it would stop promoting NSP's interfaces, Microsoft would accelerate its own work to incorporate the functions of the NSP software into Windows, thereby stimulating the development of

applications and devices that relied on the new capabilities of Intel's microprocessors. At the same time, Microsoft pressured the major OEMs to not install NSP software on their PCs until the software ceased to expose APIs. NSP software could not find its way onto PCs without the cooperation of the OEMs, so Intel realized that it had no choice but to surrender the pace of software innovation to Microsoft. By the end of July 1995, Intel had agreed to stop promoting its NSP software. Microsoft subsequently incorporated some of NSP's components into its operating-system products. Even as late as the end of 1998, though, Microsoft still had not implemented key capabilities that Intel had been poised to offer consumers in 1995.

102. Microsoft was not content to merely quash Intel's NSP software. At a second meeting at Intel's headquarters on August 2, 1995, Gates told Grove that he had a fundamental problem with Intel using revenues from its microprocessor business to fund the development and distribution of free platform-level software. In fact, Gates said, Intel could not count on Microsoft to support Intel's next generation of microprocessors as long as Intel was developing platform-level software that competed with Windows. Intel's senior executives knew full well that Intel would have difficultly selling PC microprocessors if Microsoft stopped cooperating in making them compatible with Windows and if Microsoft stated to OEMs that it did not support Intel's chips. Faced with Gates' threat, Intel agreed to stop developing platform-level interfaces that might draw support away from interfaces exposed by Windows.

103. OEMs represent the primary customers for Intel's microprocessors. Since OEMs are dependent on Microsoft for Windows, Microsoft enjoys continuing leverage over Intel. To illustrate, Gates was able to report to other senior Microsoft executives in October 1995 that "Intel feels we have all the OEMs on hold with our NSP chill." He added:

> This is good news because it means OEMs are listening to us. Andy [Grove] believes Intel is living up to its part of the NSP bargain and that we should let OEMs know that some of the new software work Intel is doing is OK. If Intel is not sticking totally to its part of the deal let me know.

2. Apple

104. QuickTime is Apple's software architecture for creating, editing, publishing, and playing back multimedia content (e.g., audio, video, graphics, and 3-D graphics). Apple has created versions of QuickTime to run on both the Mac OS and Windows, enabling developers using the authoring software to create multimedia content that will run on QuickTime implementations for both operating systems. QuickTime competes with Microsoft's own multimedia technologies, including Microsoft's multimedia APIs (called "DirectX") and its media player. Because QuickTime is cross-platform middleware, Microsoft perceives it as a potential threat to the applications barrier to entry.

105. Beginning in the spring of 1997 and continuing into the summer of 1998, Microsoft tried to persuade Apple to stop producing a Windows 95 version of its multimedia playback software, which presented developers of multimedia content with alternatives to Microsoft's multimedia APIs. If Apple acceded to the proposal, Microsoft executives said, Microsoft would not enter the authoring business and would instead assist Apple in developing and selling tools for developers writing multimedia content. Just as Netscape would have been free, had it accepted Microsoft's proposal, to market a browser shell that would run on top of Microsoft's Internet technologies, Apple would have been permitted, without hindrance, to market a media player that would run on top of DirectX. But, like the browser shell that Microsoft contemplated as acceptable for Netscape to develop, Apple's

QuickTime shell would not have exposed platform-level APIs to developers. Microsoft executives acknowledged to Apple their doubts that a firm could make a successful business out of marketing such a shell. Apple might find it profitable, though, to continue developing multimedia software for the Mac OS, and that, the executives from Microsoft assured Apple, would not be objectionable. As was the case with the Internet technologies it was prepared to tolerate from Netscape, Microsoft felt secure in the conviction that developers would not be drawn in large numbers to write for non-Microsoft APIs exposed by platforms whose installed bases were inconsequential in comparison with that of Windows.

106. In their discussions with Apple, Microsoft's representatives made it clear that, if Apple continued to market multimedia playback software for Windows 95 that presented a platform for content development, then Microsoft would enter the authoring business to ensure that those writing multimedia content for Windows 95 concentrated on Microsoft's APIs instead of Apple's. The Microsoft representatives further stated that, if Microsoft were compelled to develop and market authoring tools in competition with Apple, the technologies provided in those tools might very well be inconsistent with those provided by Apple's tools. Finally, the Microsoft executives warned, Microsoft would invest whatever resources were necessary to ensure that developers used its tools; its investment would not be constrained by the fact that authoring software generated only modest revenue.

107. If Microsoft implemented technologies in its tools that were different from those implemented in Apple's tools, then multimedia content developed with Microsoft's tools would not run properly on Apple's media player, and content developed with Apple's tools would not run properly on Microsoft's media player. If, as it implied it was willing to do, Microsoft then bundled its media player with

Windows and used a variety of tactics to limit the distribution of Apple's media player for Windows, it could succeed in extinguishing developer support for Apple's multimedia technologies. Indeed, as the Court discusses in Section VI of these findings, Microsoft had begun, in 1996, to use just such a strategy against Sun's implementation of the Java technologies.

108. The discussions over multimedia playback software culminated in a meeting between executives from Microsoft and Apple, including Apple's CEO, Steve Jobs, at Apple's headquarters on June 15, 1998. Microsoft's objective at the meeting was to secure Apple's commitment to abandon the development of multimedia playback software for Windows. At the meeting, one of the Microsoft executives, Eric Engstrom, said that he hoped the two companies could agree on a single configuration of software to play multimedia content on Windows. He added, significantly, that any unified multimedia playback software for Windows would have to be based on DirectX. If Apple would agree to make DirectX the standard, Microsoft would be willing to do several things that Apple might find beneficial. First, Microsoft would adopt Apple's ".MOV" as the universal file format for multimedia playback on Windows. Second, Microsoft would configure the Windows Media Player to display the QuickTime logo during the playback of ".MOV" files. Third, Microsoft would include support in DirectX for QuickTime APIs used to author multimedia content, and Microsoft would give Apple appropriate credit for the APIs in Microsoft's Software Developer Kit.

109. Jobs reserved comment during the meeting with the Microsoft representatives, but he explicitly rejected Microsoft's proposal a few weeks later. Had Apple accepted Microsoft's proposal, Microsoft would have succeeded in limiting substantially the cross-platform development of multimedia content. In addition, Apple's future success in

marketing authoring tools for Windows 95 would have become dependent on Microsoft's ongoing cooperation, for those tools would have relied on the DirectX technologies under Microsoft's control.

110. Apple's surrender of the multimedia playback business might have helped users in the short term by resolving existing incompatibilities in the arena of multimedia software. In the long run, however, the departure of an experienced, innovative competitor would not have tended to benefit users of multimedia content. At any rate, the primary motivation behind Microsoft's proposal to Apple was not the resolution of incompatibilities that frustrated consumers and stymied content development. Rather, Microsoft's motivation was its desire to limit as much as possible the development of multimedia content that would run cross-platform.

3. RealNetworks

111. RealNetworks is the leader, in terms of usage share, in software that supports the "streaming" of audio and video content from the Web. RealNetworks' streaming software presents a set of APIs that competes for developer attention with APIs exposed by the streaming technologies in Microsoft's DirectX. Like Apple, RealNetworks has developed versions of its software for multiple operating systems. In 1997, senior Microsoft executives viewed RealNetworks' streaming software with the same apprehension with which they viewed Apple's playback software—as competitive technology that could develop into part of a middleware layer that could, in turn, become broad and widespread enough to weaken the applications barrier to entry.

112. At the end of May 1997, Gates told a group of Microsoft executives that multimedia streaming represented strategic ground that Microsoft needed to capture. He identified RealNetworks as the adversary and authorized the

payment of up to $65 million for a streaming software company in order to accelerate Microsoft's effort to seize control of streaming standards. Two weeks later, Microsoft signed a letter of intent for the acquisition of a streaming media company called VXtreme.

113. Perhaps sensing an impending crisis, executives at RealNetworks contacted Microsoft within days of the VXtreme deal's announcement and proposed that the two companies enter a strategic relationship. The CEO of RealNetworks told a senior vice president at Microsoft that if RealNetworks were presented with a profitable opportunity to move to value-added software, the company would be amenable to abandoning the base streaming business. On July 10, a Microsoft executive, Robert Muglia, told a RealNetworks executive that it would indeed be in the interests of both companies if RealNetworks limited itself to developing value-added software designed to run on top of Microsoft's fundamental multimedia platform. Consequently, on July 18, Microsoft and RealNetworks entered into an agreement whereby Microsoft agreed to distribute a copy of RealNetworks' media player with each copy of Internet Explorer; to make a substantial investment in RealNetworks; to license the source code for certain RealNetworks streaming technologies; and to develop, along with RealNetworks, a common file format for streaming audio and video content. Muglia, who signed the agreement on Microsoft's behalf, believed that RealNetworks had in turn agreed to incorporate Microsoft's streaming media technologies into its products.

114. RealNetworks apparently understood the import of the agreement differently, for just a few days after it signed the deal with Microsoft, RealNetworks announced that it planned to continue developing fundamental streaming software. Indeed, RealNetworks continues to do so today. Thus, the mid-summer negotiations did not lead to the result Microsoft had intended. Still, Microsoft's intentions toward

RealNetworks in 1997, and its dealings with the company that summer, show that decision-makers at Microsoft were willing to invest a large amount of cash and other resources into securing the agreement of other companies to halt software development that exhibited discernible potential to weaken the applications barrier.

4. IBM

115. IBM is both a hardware and a software company. On the hardware side, IBM manufactures and licenses, among other things, Intel-compatible PCs. On the software side, IBM develops and sells, among other things, Intel-compatible PC operating systems and office productivity applications. The IBM PC Company relies heavily on Microsoft's cooperation to make a profit, for few consumers would buy IBM PC systems if those systems did not work well with Windows and, further, if they did not come with Windows included. IBM's software division, on the other hand, competes directly with Microsoft in other respects. For instance, IBM has in the past marketed OS/2 as an alternative to Windows, and it currently markets the SmartSuite bundle of office productivity applications as an alternative to Microsoft's Office suite. The fact that IBM's software division markets products that compete directly with Microsoft's most profitable products has frustrated the efforts of the IBM PC Company to maintain a cooperative relationship with the firm that controls the product (Windows) without which the PC Company cannot survive.

116. Whereas Microsoft tried to convince Netscape to move its business in a direction that would not facilitate the emergence of products that would compete with Windows, Microsoft tried to convince IBM to move its business away from products that themselves competed directly with Windows and Office. Microsoft leveraged the fact that the PC Company needed to license Windows at a competitive price and on a timely basis, and the fact that the company needed Microsoft's support in many more subtle ways.

When IBM refused to abate the promotion of those of its own products that competed with Windows and Office, Microsoft punished the IBM PC Company with higher prices, a late license for Windows 95, and the withholding of technical and marketing support.

117. In the summer of 1994, the IBM PC Company told Microsoft that, with respect to licensing Microsoft's operating-system products, it wanted to be quoted terms just as favorable as those extended to IBM's competitor, Compaq. It was IBM's belief that Compaq paid the lowest rate in the industry for Windows and enjoyed unparalleled marketing and technical support from Microsoft. In response to the IBM PC Company's request, Microsoft proposed that the companies enter into a "Frontline Partnership" similar to the one that existed between Microsoft and Compaq. Pursuant to that proposal, Microsoft and the IBM PC Company would perform joint sales, marketing, and development work, and the PC Company would receive future Microsoft products at the lowest rates in the industry.

118. At the same time that it offered the IBM PC Company the rather general terms in the Frontline Partnership Agreement, Microsoft also offered the PC Company specific reductions in the royalty rate for Windows 95 if the company would focus its marketing and distribution efforts on Microsoft's new operating system. Specifically, the PC Company would receive an $8 reduction in the per-copy royalty for Windows 95 if it mentioned no other operating systems in advertisements for IBM PCs, adopted Windows 95 as the standard operating system for its employees, and ensured that it was shipping Windows 95 pre-installed on at least fifty percent of its PCs two months after the release of Windows 95. Given the volume of IBM's PC shipments, the discount would have amounted to savings of between $40 million and $48 million in one year. Of course, accepting the terms would have required IBM, as a practical matter, to abandon its own operating system, OS/2.

After all, IBM would have had difficulty convincing customers to adopt its own OS/2 if the company itself had used Microsoft's Windows 95 and had featured that product to the exclusion of OS/2 in IBM PC advertisements.

119. Representatives from IBM and Microsoft, including Bill Gates, met to discuss the relationship between their companies at an industry conference in November 1994. At that meeting, IBM informed Microsoft that, rather than enter into the Frontline Partnership with Microsoft, IBM was going to pursue an initiative it called "IBM First." Consistent with the title of the initiative, IBM would aggressively promote IBM's software products, would not promote any Microsoft products, and would pre-install OS/2 Warp on all of its PCs, including those on which it would also pre-install Windows. IBM thus rejected the terms that would have resulted in an $8 reduction in the per-copy royalty price of Windows 95.

120. True to its word, IBM began vigorous promotion of its software products. This effort included an advertising campaign, starting in late 1994, that extolled OS/2 Warp and disparaged Windows. IBM's drive to best Microsoft in the PC software venue intensified in June 1995, when IBM reached an agreement with the Lotus Development Corporation for the acquisition of that company. As a consequence of the acquisition, IBM took ownership of the Lotus groupware product, Lotus Notes, and the Lotus SmartSuite bundle of office productivity applications. Microsoft had already identified Notes as a middleware threat, because it presented users with a common interface, and ISVs with a common set of APIs, across multiple platforms. For its part, SmartSuite competed directly with Microsoft Office. In mid-July 1995, IBM announced that it was going to make SmartSuite its primary desktop software offering in the United States.

121. Microsoft did not intend to capitulate. In July, Gates called an executive at the IBM PC Company to berate

him about IBM's public statements denigrating Windows. Just a few days later, Microsoft began to retaliate in earnest against the IBM PC Company.

122. The IBM PC Company had begun negotiations with Microsoft for a Windows 95 license in late March 1995. For the first two months, the negotiations had progressed smoothly and at an expected pace. After IBM announced its intention to acquire Lotus, though, the Microsoft negotiators began canceling meetings with their IBM counterparts, failing to return telephone calls, and delaying the return of marked-up license drafts that they received from IBM. Then, on July 20, 1995, just three days after IBM announced its intention to pre-install SmartSuite on its PCs, a Microsoft executive informed his counterpart at the IBM PC Company that Microsoft was terminating further negotiations with IBM for a license to Windows 95. Microsoft also refused to release to the PC Company the Windows 95 "golden master" code. The PC Company needed the code for its product planning and development, and IBM executives knew that Microsoft had released it to IBM's OEM competitors on July 17. Microsoft's purported reason for halting the negotiations was that it wanted first to resolve an ongoing audit of IBM's past royalty payments to Microsoft for several different operating systems.

123. Prior to the call on July 20, neither company's management had ever linked the ongoing audit to IBM's negotiations for a license to Windows 95. IBM was dismayed by the abrupt halt in the license negotiations and the prospect that it might not get a license for Windows 95 until the audit process concluded. IBM's executives surmised that all of its major competitors had already signed licenses for Windows 95. The PC Company would lose a great deal of business to those competitors during the crucial back-to-school season if it could not begin pre-installing Windows 95 on its PCs immediately. The conclusion of the audit appeared to be weeks, if not months, away. The PC

Company thus faced the prospect of missing the holiday selling season as well. IBM executives pleaded with Microsoft to uncouple the license negotiations from the ongoing audit and offered Microsoft a $10 million bond that Microsoft could use to indemnify itself against any discrepancies that the audit might ultimately reveal. IBM also offered to add a term to any Windows 95 license agreement whereby IBM would pay penalties and interest if any future audit disclosed under-reporting of royalties by IBM.

124. On August 9, 1995, a senior executive at the IBM PC Company went to Redmond to meet with Joachim Kempin, the Microsoft executive in charge of the firm's sales to OEMs. At the meeting, Kempin offered to accept a single, lump-sum payment from IBM that would close all outstanding audits. The amount of this payment would be reduced if IBM offered a concession that Kempin could take back to Gates. As one possibility, Kempin suggested that IBM agree to not bundle SmartSuite with its PCs for a period of six months to one year. He explained that the prospect of IBM bundling SmartSuite with its PCs threatened the profit margins that Microsoft derived from Office and constituted a core issue in the relationship between the two companies. The IBM executive rejected Kempin's suggestion. In a follow-up letter, Kempin stated that Microsoft would require approximately $25 million from IBM in order to settle all outstanding audits. Kempin reiterated that,

> If you believe that the amount I am asking for is too much, I would be willing to trade certain relationship improving measures for the settlement charges and/or convert some of the amounts into marketing funds if IBM too agrees to promote Microsoft's software products together with their hardware offerings.

The message was clear: IBM could resolve the impasse ostensibly blocking the issuance of a Windows 95 license—

the royalties audit—by de-emphasizing those products of its own that competed with Microsoft and instead promoting Microsoft's products.

125. IBM never agreed to renounce SmartSuite or to increase its support for Microsoft software, and in the end, Microsoft did not grant IBM a license to pre-install Windows 95 until fifteen minutes before the start of Microsoft's official launch event on August 24, 1995. That same day, the firms brought the audit issue to a close with a settlement agreement under which IBM ultimately paid Microsoft $31 million. The release of Windows 95 had been postponed more than once, and many consumers apparently had been postponing buying PC systems until the new operating system arrived. The pent-up demand caused an initial surge in the sales of PCs loaded with Windows 95. IBM's OEM competitors reaped the fruits of this surge, but because of the delay in obtaining a license, the IBM PC Company did not. The PC Company also missed the back-to-school market. These lost opportunities cost IBM substantial revenue.

126. Even once the companies had resolved the audit dispute, Microsoft continued to treat the IBM PC Company less favorably than it did the other major OEMs, and Microsoft executives continued to tell PC Company executives that the treatment would improve only if IBM refrained from competing with Microsoft's software offerings. On January 5, 1996, Kempin sent a letter to a counterpart at the IBM PC Company. In it, Kempin expressed his belief that the PC Company would enjoy a closer, more cooperative relationship with Microsoft if only IBM's software arm did not compete as aggressively with the products that comprised the core of Microsoft's business:

> As long as IBM is working first on their competitive offerings and prefers to fiercely compete with us in critical areas, we should just be honest with each other and admit that such priorities will not lead to a most exciting

> relationship and might not even make IBM feel good when selling solutions based on Microsoft products. . . .You are a valued OEM customer of Microsoft, with whom we will cooperate as much as your self-imposed restraints allow us to do. Please understand that this is neither my choice or preferred way of doing business with an important company like IBM. In addition, we would like to see the IBM PC company being more actively involved in assisting Microsoft to bring key products to market . . . . To date the IBM PC company has not always been an active participant in these areas - understandable given your own internal product priorities. I hope you can help me to change this.

In closing, Kempin wrote, "You get measured in selling more hardware and I firmly believe if you had less conflict with IBM's software directions you actually could sell more of it."

127. When Kempin spoke to the same executive at the end of the month, he repeated a message he had delivered more than once before: The fact that the IBM PC Company pre-installed SmartSuite on its PC systems made Microsoft reluctant to help IBM sell more PC systems. After all, the more PC systems IBM sold with SmartSuite, the fewer copies of Office Microsoft could sell. For this reason, as Kempin explained to a group of IBM PC Company representatives in August 1996, Microsoft refused to provide IBM press releases with quotes endorsing any PC system that IBM shipped with SmartSuite. Microsoft later expanded that rule to cover any IBM PCs shipped with the World Book electronic encyclopedia instead of Microsoft's Encarta. IBM might have been less concerned about Microsoft's refusal to offer endorsements if such quotes did not appear frequently and prominently in press releases announcing new PC

systems from other OEMs such as Compaq. Microsoft's conspicuous silence with respect to IBM PCs sent the message to customers that IBM PCs did not support Windows as well as did PCs manufactured by other OEMs.

128. Microsoft also denied the IBM PC Company access to the so-called "enabling programs" that Microsoft ran for the benefit of OEMs such as Compaq, Hewlett-Packard, and DEC, even though IBM met the prescribed, objective criteria for admission. Like the absence of public endorsements, IBM's exclusion from Microsoft's enabling programs led customers to question whether the Microsoft software they needed would work optimally with IBM's PCs. IBM learned through surveys it conducted that the firm had lost between seven and ten large accounts, representing about $180 million in revenue for IBM, because the tension between Microsoft and IBM led customers to doubt that Windows would work as well with IBM PCs as with PCs produced by firms with which Microsoft was on cordial terms. Microsoft justified its exclusion of the PC Company from the enabling programs with its suspicion that IBM might use the programs to gain *entrée* with customers and then attempt to sell those customers IBM software instead of Microsoft products. At the same time, a Microsoft executive told a counterpart at IBM that the PC Company would be admitted to the programs when IBM's CEO repaired his relationship with Bill Gates.

129. Microsoft's executives were persistent despite IBM's repeated refusals to sacrifice its own software ambitions to improve its relations with Microsoft. In February 1997, one executive from Microsoft told a group of IBM PC Company executives that Gates might relent in his reluctance to cooperate with their company if IBM moderated its support for Notes and SmartSuite. In a meeting held the next month, Microsoft representatives conditioned fulfillment of two objects of IBM's desires on the company's willingness to pre-install Microsoft's products in the place of

competing applications, such as SmartSuite, and objectionable middleware, such as Notes. The first inducement that the Microsoft representatives blandished before the PC Company was early access to Windows source code, which Compaq and a handful of other OEMs enjoyed. IBM wanted this early access in order to ensure its hardware's contemporaneous compatibility with Microsoft's operating system products. Next, Microsoft offered IBM permission to certify itself as being compliant with certain hardware requirements that Microsoft imposed (and that customers had come to look for as a sign of an OEM's ability to support Windows). Self-certification would have decreased the time it took IBM PCs to reach the market, and IBM knew that the privilege was already being extended to some of its main OEM competitors. With respect to both benefits, the representatives from Microsoft explained that Microsoft would extend them to the PC Company on the condition that it stop loading its PC systems with software that threatened Microsoft's interests.

130. The discriminatory treatment that the IBM PC Company received from Microsoft on account of the "software directions" of its parent company also manifested itself in the royalty price that IBM paid for Windows. In the latter half of the 1990s, IBM (along with Gateway) paid significantly more for Windows than other major OEMs (like Compaq, Dell, and Hewlett-Packard) that were more compliant with Microsoft's wishes.

131. Finally, Microsoft made its frustration known to IBM by reducing, from three to one, the number of Microsoft OEM account managers handling Microsoft's operational relationship with the IBM PC Company. This reduced support impaired still further IBM's ability to test, manufacture, and ship its PCs on schedule, further delaying IBM's efforts to bring its PC products to market against the competition in a timely manner.

132. In sum, from 1994 to 1997, Microsoft consistently pressured IBM to reduce its support for software products that competed with Microsoft's offerings, and it used its monopoly power in the market for Intel-compatible PC operating systems to punish IBM for its refusal to cooperate. Whereas, in the case of Netscape, Microsoft tried to induce a company to move its business away from offering software that could weaken the applications barrier to entry, Microsoft's primary concern with IBM was to reduce the firm's support for software products that competed directly with Microsoft's most profitable products, namely Windows and Office. That being said, it must be noted that one of the IBM products to which Microsoft objected, Notes, was like Navigator in that it exposed middleware APIs. In any event, Microsoft's interactions with Netscape, IBM, Intel, Apple, and RealNetworks all reveal Microsoft's business strategy of directing its monopoly power toward inducing other companies to abandon projects that threaten Microsoft and toward punishing those companies that resist.

D. Developing Competitive Web Browsing Software

133. Once it became clear to senior executives at Microsoft that Netscape would not abandon its efforts to develop Navigator into a platform, Microsoft focused its efforts on ensuring that few developers would write their applications to rely on the APIs that Navigator exposed. Developers would only write to the APIs exposed by Navigator in numbers large enough to threaten the applications barrier if they believed that Navigator would emerge as the standard software employed to browse the Web. If Microsoft could demonstrate that Navigator would not become the standard, because Microsoft's own browser would attract just as much if not more usage, then developers would continue to focus their efforts on a platform that enjoyed enduring ubiquity: the 32-bit Windows API set.

Microsoft thus set out to maximize Internet Explorer's share of browser usage at Navigator's expense.

134. Microsoft's management believed that, no matter what the firm did, Internet Explorer would not capture a large share of browser usage as long as it remained markedly inferior to Navigator in the estimation of consumers. The task of technical personnel at Microsoft, then, was to make Internet Explorer's features at least as attractive to consumers as Navigator's. Microsoft did not believe that improved quality alone would depose Navigator, for millions of users appeared to be satisfied with Netscape's product, and Netscape was known as 'the Internet company.' As Gates wrote to Microsoft's executive staff in his May 1995 "Internet Tidal Wave" memorandum, "First we need to offer a decent client," but "this alone won't get people to switch away from Netscape." Still, once Microsoft ensured that the average consumer would be just as comfortable browsing with Internet Explorer as with Navigator, Microsoft could employ other devices to induce consumers to use its browser instead of Netscape's.

135. From 1995 onward, Microsoft spent more than $100 million each year developing Internet Explorer. The firm's management gradually increased the number of developers working on Internet Explorer from five or six in early 1995 to more than one thousand in 1999. Although the first version of Internet Explorer was demonstrably inferior to Netscape's then-current browser product when the former was released in July 1995, Microsoft's investment eventually started to pay technological dividends. When Microsoft released Internet Explorer 3.0 in late 1996, reviewers praised its vastly improved quality, and some even rated it as favorably as they did Navigator. After the arrival of Internet Explorer 4.0 in late 1997, the number of reviewers who regarded it as the superior product was roughly equal to those who preferred Navigator.

E. Giving Internet Explorer Away and Rewarding Firms that Helped Build Its Usage Share

136. In addition to improving the quality of Internet Explorer, Microsoft sought to increase the product's share of browser usage by giving it away for free. In many cases, Microsoft also gave other firms things of value (at substantial cost to Microsoft) in exchange for their commitment to distribute and promote Internet Explorer, sometimes explicitly at Navigator's expense. While Microsoft might have bundled Internet Explorer with Windows at no additional charge even absent its determination to preserve the applications barrier to entry, that determination was the main force driving its decision to price the product at zero. Furthermore, Microsoft would not have given Internet Explorer away to IAPs, ISVs, and Apple, nor would it have taken on the high cost of enlisting firms in its campaign to maximize Internet Explorer's usage share and limit Navigator's, had it not been focused on protecting the applications barrier.

137. In early 1995, personnel developing Internet Explorer at Microsoft contemplated charging OEMs and others for the product when it was released. Internet Explorer would have been included in a bundle of software that would have been sold as an add-on, or "frosting," to Windows 95. Indeed, Microsoft knew by the middle of 1995, if not earlier, that Netscape charged customers to license Navigator, and that Netscape derived a significant portion of its revenue from selling browser licenses. Despite the opportunity to make a substantial amount of revenue from the sale of Internet Explorer, and with the knowledge that the dominant browser product on the market, Navigator, was being licensed at a price, senior executives at Microsoft decided that Microsoft needed to give its browser away in furtherance of the larger strategic goal of accelerating Internet Explorer's acquisition of browser usage share.

Consequently, Microsoft decided not to charge an increment in price when it included Internet Explorer in Windows for the first time, and it has continued this policy ever since. In addition, Microsoft has never charged for an Internet Explorer license when it is distributed separately from Windows.

138. Over the months and years that followed the release of Internet Explorer 1.0 in July 1995, senior executives at Microsoft remained engrossed with maximizing Internet Explorer's share of browser usage. Whenever competing priorities threatened to intervene, decision-makers at Microsoft reminded those reporting to them that browser usage share remained, as Microsoft senior vice president Paul Maritz put it, "job #1." For example, in the summer of 1997, some mid-level employees began to urge that Microsoft charge a price for at least some of the components of Internet Explorer 4.0. This would have shifted some anticipatory demand to Windows 98 (which was due to be released somewhat later than Internet Explorer 4.0), since Windows 98 would include all of the browser at no extra charge. Senior executives at Microsoft rejected the proposal, because while the move might have increased demand for Windows 98 and generated substantial revenue, it would have done so at the unacceptable cost of retarding the dissemination of Internet Explorer 4.0. Maritz reminded those who had advocated the proposal that "getting browser share up to 50% (or more) is still the major goal."

139. The transcendent importance of browser usage share to Microsoft is evident in what the firm expended, as well as in what it relinquished, in order to maximize usage share for Internet Explorer and to diminish it for Navigator. Not only was Microsoft willing to forego an opportunity to attract substantial revenue while enhancing (albeit temporarily) consumer demand for Windows 98, but the company also paid huge sums of money, and sacrificed many millions more in lost revenue every year, in order to

induce firms to take actions that would help increase Internet Explorer's share of browser usage at Navigator's expense. First, even though Microsoft could have charged IAPs, ISVs, and Apple for licenses to distribute Internet Explorer separately from Windows, Microsoft priced those licenses, along with related technology and technical support, at zero in order to induce those companies to distribute and promote Internet Explorer over Navigator. Second, although Microsoft could have charged IAPs and ICPs substantial sums of money in exchange for promoting their services and content within Windows, Microsoft instead bartered Windows' valuable desktop "real estate" for a commitment from those firms to promote and distribute Internet Explorer, to inhibit promotion and distribution of Navigator, and to employ technologies that would inspire developers to write Web sites that relied on Microsoft's Internet technologies rather than those provided by Navigator. Microsoft was willing to offer such prominent placement even to AOL, which was the principal competitor to Microsoft's MSN service. If an IAP was already under contract to pay Netscape a certain amount for browser licenses, Microsoft offered to compensate the IAP the amount it owed Netscape. Third, Microsoft also reduced the referral fees that IAPs paid when users signed up for their services using the Internet Referral Server in Windows in exchange for the IAPs' efforts to convert their installed bases of subscribers from Navigator to Internet Explorer. For example, Microsoft entered a contract with AOL whereby Microsoft actually paid AOL a bounty for every subscriber that it converted to access software that included Internet Explorer instead of Navigator. Finally, with respect to OEMs, Microsoft extended co-marketing funds and reductions in the Windows royalty price to those agreeing to promote Internet Explorer and, in some cases, to abstain from promoting Navigator.

140. Even absent the strategic imperative to maximize its browser usage share at Netscape's expense, Microsoft might still have set the price of an Internet Explorer

consumer license at zero. It might also have spent something approaching the $100 million it has devoted each year to developing Internet Explorer and some part of the $30 million it has spent annually marketing it. After all, consumers in 1995 were already demanding software that enabled them to use the Web with ease, and IBM had announced in September 1994 its plan to include browsing capability in OS/2 Warp at no extra charge. Microsoft had reason to believe that other operating-system vendors would do the same.

141. Still, had Microsoft not viewed browser usage share as the key to preserving the applications barrier to entry, the company would not have taken its efforts beyond developing a competitive browser product, including it with Windows at no additional cost to consumers, and promoting it with advertising. Microsoft would not have absorbed the considerable additional costs associated with enlisting other firms in its campaign to increase Internet Explorer's usage share at Navigator's expense. This investment was only profitable to the extent that it protected the applications barrier to entry. Neither the desire to bolster demand for Windows, nor the prospect of ancillary revenues, explains the lengths to which Microsoft has gone. For one thing, loading Navigator makes Windows just as Internet-ready as including Internet Explorer does. Therefore, Microsoft's costly efforts to limit the use of Navigator on Windows could not have stemmed from a desire to bolster consumer demand for Windows. Furthermore, there is no conceivable way that Microsoft's costly efforts to induce Apple to pre-install Internet Explorer on Apple's own PC systems could have increased consumer demand for Windows.

142. In pursuing its goal of maximizing Internet Explorer's usage share, Microsoft actually has limited rather severely the number of profit centers from which it could otherwise derive income via Internet Explorer. For example, Microsoft allows the developers of browser shells built on

Internet Explorer to collect ancillary revenues such as advertising fees; for another, Microsoft permits its browser licensees to change the browser's start page, thus limiting the fees that advertisers are willing to pay for placement on that page by Microsoft. Even if Microsoft maximized its ancillary revenue, the amount of revenue realized would not come close to recouping the cost of its campaign to maximize Internet Explorer's usage share at Navigator's expense. The countless communications that Microsoft's executives dispatched to each other about the company's need to capture browser usage share indicate that the purpose of the effort had little to do with attracting ancillary revenues and everything to do with protecting the applications barrier from the threat posed by Netscape's Navigator and Sun's implementation of Java. For example, Microsoft vice president Brad Chase told the company's assembled sales and marketing executives in April 1996 that they should "worry about your browser share[] as much as BillG" even though Internet Explorer was "a no revenue product," because "we will loose [sic] the Internet platform battle if we do not have a significant user installed base." He told them that "if you let your customers deploy Netscape Navigator, you will loose [sic] leadership on the desktop."

F. Excluding Navigator from Important Distribution Channels

143. Decision-makers at Microsoft worried that simply developing its own attractive browser product, pricing it at zero, and promoting it vigorously would not divert enough browser usage from Navigator to neutralize it as a platform. They believed that a comparable browser product offered at no charge would still not be compelling enough to consumers to detract substantially from Navigator's existing share of browser usage. This belief was due, at least in part, to the fact that Navigator already enjoyed a very large installed base and had become nearly synonymous with the Web in the public's consciousness. If Microsoft was going to

raise Internet Explorer's share of browser usage and lower Navigator's share, executives at Microsoft believed they needed to constrict Netscape's access to the distribution channels that led most efficiently to browser usage.

1. The Importance of the OEM and IAP Channels

144. Very soon after it recognized the need to gain browser usage share at Navigator's expense, Microsoft identified pre-installation by OEMs and bundling with the proprietary client software of IAPs as the two distribution channels that lead most efficiently to browser usage. Two main reasons explain why these channels are so efficient. First, users must acquire a computer and connect to the Internet before they can browse the Web. Thus, the OEM and IAP channels lead directly to virtually every user of browsing software. Second, both OEMs and IAPs are able to place browsing software at the immediate disposal of a user without any effort on the part of the user. If an OEM pre-installs a browser onto its PCs and places an icon for that browser on the default screen, or "desktop," of the operating system, purchasers of those PCs will be confronted with the icon as soon as the operating system finishes loading into random access memory ("RAM"). If an IAP bundles a browser with its own proprietary software, its subscribers will, by default, use the browser whenever they connect to the Web. In its internal decision-making, Microsoft has placed considerable reliance on studies showing that consumers tend strongly to use whatever browsing software is placed most readily at their disposal, and that once they have acquired, found, and used one browser product, most are reluctant—and indeed have little reason—to expend the effort to switch to another. Microsoft has also relied on studies showing that a very large majority of those who browse the Web obtain their browsing software with either their PCs or their IAP subscriptions.

145. Indeed, no other distribution channel for browsing software even approaches the efficiency of OEM pre-installation and IAP bundling. The primary reason is that the other channels require users to expend effort before they can start browsing. The traditional retail channel, for example, requires the consumer to make contact with a retailer, and retailers generally do not distribute products without charging a price for them. Naturally, once Microsoft and Netscape began offering browsing software for free, consumers for the most part lost all incentive to pay for it.

146. The relatively few users who already have a browser but would prefer another can avoid the retail channel by using the Internet to download new browsing software electronically, but they must wait for the software to transmit to their PCs. This process takes a moderate degree of sophistication and substantial amount of time, and as the average bandwidth of PC connections has grown, so has the average size of browser products. The longer it takes for the software to download, the more likely it is that the user's connection to the Internet will be interrupted. As a vanguard of the "Internet Age," Navigator generated a tremendous amount of excitement in its early days among technical sophisticates, who were willing to devote time and effort to downloading the software. Today, however, the average Web user is more of a neophyte, and is far more likely to be intimidated by the process of downloading. It is not surprising, then, that downloaded browsers now make up only a small and decreasing percentage of the new browsers (as opposed to upgrades) that consumers obtain and use.

147. The consumer who receives a CD-ROM containing a free browser in the mail or as a magazine insert is at least spared the time and effort it would take to obtain browsing software from a retail vendor or to download it from the Web. But, just as the consumer who obtains a browser at retail or off the Web, the consumer who receives the software unsolicited at home must first install it on a PC

system in order to use it, and merely installing a browser product takes time and can be confusing for novice users. Plus, a large percentage of the unsolicited disks distributed through "carpet bombing" reach individuals who do not have PCs, who already have pre-installed browsing software, or who have no interest in browsing the Web. In practice, less than two percent of CD-ROM disks disseminated in mass-distribution campaigns are used in the way the distributor intended. As a result, this form of distribution is rarely profitable, and then only when undertaken by on-line subscription services for whom a sale translates into a stream of revenues lasting into the future. The fact that an OLS may find it worthwhile to "carpet bomb" consumers with free disks obviously only helps the vendor of browsing software whose product the OLS has chosen to bundle with its proprietary software. So, while there are other means of distributing browsers, the fact remains that to a firm interested in browser usage, there simply are no channels that compare in efficiency to OEM pre-installation and IAP bundling.

148. Knowing that OEMs and IAPs represented the most efficient distribution channels of browsing software, Microsoft sought to ensure that, to as great an extent as possible, OEMs and IAPs bundled and promoted Internet Explorer to the exclusion of Navigator.

2. Excluding Navigator from the OEM Channel

a. Binding Internet Explorer to Windows

i. The Status of Web Browsers as Separate Products

149. Consumers determine their software requirements by identifying the functionalities they desire. While consumers routinely evaluate software products on the basis

of the functionalities the products deliver, they generally lack sufficient information to make judgments based on the designs and implementations of those products. Accordingly, consumers generally choose which software products to license, install, and use on the basis of the products' functionalities, not their designs and implementations.

150. While the meaning of the term "Web browser" is not precise in all respects, there is a consensus in the software industry as to the functionalities that a Web browser offers a user. Specifically, a Web browser provides the ability for the end user to select, retrieve, and perceive resources on the Web. There is also a consensus in the software industry that these functionalities are distinct from the set of functionalities provided by an operating system.

151. Many consumers desire to separate their choice of a Web browser from their choice of an operating system. Some consumers, particularly corporate consumers, demand browsers and operating systems separately because they prefer to standardize on the same browser across different operating systems. For such consumers, standardizing on the browser of their choice results in increased productivity and lower training and support costs, and permits the establishment of consistent security and privacy policies governing Web access.

152. Moreover, many consumers who need an operating system, including a substantial percentage of corporate consumers, do not want a browser at all. For example, if a consumer has no desire to browse the Web, he may not want a browser taking up memory on his hard disk and slowing his system's performance. Also, for businesses desiring to inhibit employees' access to the Internet while minimizing system support costs, the most efficient solution is often using PC systems without browsers.

153. Because of the separate demand for browsers and operating systems, firms have found it efficient to supply the

products separately. A number of operating system vendors offer consumers the choice of licensing their operating systems without a browser. Others bundle a browser with their operating system products but allow OEMs, value-added resellers, and consumers either to not install it or, if the browser has been pre-installed, to uninstall it. While Microsoft no longer affords this flexibility (it is the only operating system vendor that does not), it has always marketed and distributed Internet Explorer separately from Windows in several channels. These include retail sales, service kits for ISVs, free downloads over the Internet, and bundling with other products produced both by Microsoft and by third-party ISVs. In order to compete with Navigator for browser share, as well as to satisfy corporate consumers who want their diverse PC platforms to present a common browser interface to employees, Microsoft has also created stand-alone versions of Internet Explorer that run on operating systems other than 32-bit Windows, including the Mac OS and Windows 3.x.

154. In conclusion, the preferences of consumers and the responsive behavior of software firms demonstrate that Web browsers and operating systems are separate products.

ii. Microsoft's Actions

155. In contrast to other operating system vendors, Microsoft both refused to license its operating system without a browser and imposed restrictions—at first contractual and later technical—on OEMs' and end users' ability to remove its browser from its operating system. As its internal contemporaneous documents and licensing practices reveal, Microsoft decided to bind Internet Explorer to Windows in order to prevent Navigator from weakening the applications barrier to entry, rather than for any pro-competitive purpose.

156. Before it decided to blunt the threat that Navigator posed to the applications barrier to entry,

Microsoft did not plan to make it difficult or impossible for OEMs or consumers to obtain Windows without obtaining Internet Explorer. In fact, the company's internal correspondence and external communications indicate that, as late as the fall of 1994, Microsoft was planning to include low-level Internet "plumbing," such as a TCP/IP stack, but not a browser, with Windows 95.

157. Microsoft subsequently decided to develop a browser to run on Windows 95. As late as June 1995, however, Microsoft had not decided to bundle that browser with the operating system. The plan at that point, rather, was to ship the browser in a separate "frosting" package, for which Microsoft intended to charge. By April or May of that year, however, Microsoft's top executives had identified Netscape's browser as a potential threat to the applications barrier to entry. Throughout the spring, more and more key executives came to the conclusion that Microsoft's best prospect of quashing that threat lay in maximizing the usage share of Microsoft's browser at Navigator's expense. The executives believed that the most effective way of carrying out this strategy was to ensure that every copy of Windows 95 carried with it a copy of Microsoft's browser, then code-named "O'Hare." For example, two days after the June 21, 1995 meeting between Microsoft and Netscape executives, Microsoft's John Ludwig sent an E-mail to Paul Maritz and the other senior executives involved in Microsoft's browser effort. "[O]bviously netscape does see us as a client competitor," Ludwig wrote. "[W]e have to work extra hard to get ohare on the oem disks."

158. Microsoft did manage to bundle Internet Explorer 1.0 with the first version of Windows 95 licensed to OEMs in July 1995. It also included a term in its OEM licenses that prohibited the OEMs from modifying or deleting any part of Windows 95, including Internet Explorer, prior to shipment. The OEMs accepted this restriction despite their interest in meeting consumer demand for PC operating systems without

Internet Explorer. After all, Microsoft made the restriction a non-negotiable term in its Windows 95 license, and the OEMs felt they had no commercially viable alternative to pre-installing Windows 95 on their PCs. Apart from a few months in the fall of 1997, when Microsoft provided OEMs with Internet Explorer 4.0 on a separate disk from Windows 95 and permitted them to ship the latter without the former, Microsoft has never allowed OEMs to ship Windows 95 to consumers without Internet Explorer. This policy has guaranteed the presence of Internet Explorer on every new Windows PC system.

159. Microsoft knew that the inability to remove Internet Explorer made OEMs less disposed to pre-install Navigator onto Windows 95. OEMs bear essentially all of the consumer support costs for the Windows PC systems they sell. These include the cost of handling consumer complaints and questions generated by Microsoft's software. Pre-installing more than one product in a given category, such as word processors or browsers, onto its PC systems can significantly increase an OEM's support costs, for the redundancy can lead to confusion among novice users. In addition, pre-installing a second product in a given software category can increase an OEM's product testing costs. Finally, many OEMs see pre-installing a second application in a given software category as a questionable use of the scarce and valuable space on a PC's hard drive.

160. Microsoft's executives believed that the incentives that its contractual restrictions placed on OEMs would not be sufficient in themselves to reverse the direction of Navigator's usage share. Consequently, in late 1995 or early 1996, Microsoft set out to bind Internet Explorer more tightly to Windows 95 as a technical matter. The intent was to make it more difficult for anyone, including systems administrators and users, to remove Internet Explorer from Windows 95 and to simultaneously complicate the experience of using Navigator with Windows 95. As Brad

Chase wrote to his superiors near the end of 1995, "We will bind the shell to the Internet Explorer, so that running any other browser is a jolting experience."

161. Microsoft bound Internet Explorer to Windows 95 by placing code specific to Web browsing in the same files as code that provided operating system functions. Starting with the release of Internet Explorer 3.0 and "OEM Service Release 2.0" ("OSR 2") of Windows 95 in August 1996, Microsoft offered only a version of Windows 95 in which browsing-specific code shared files with code upon which non-browsing features of the operating system relied.

162. The software code necessary to supply the functionality of a modern application or operating system can be extremely long and complex. To make that complexity manageable, developers usually write long programs as a series of individual "routines," each ranging from a few dozen to a few hundred lines of code, that can be used to perform specific functions. Large programs are created by "knitting" together many such routines in layers, where the lower layers are used to provide fundamental functionality relied upon by higher, more focused layers. Some preliminary aspects of this "knitting" are performed by the software developer. The user who launches a program, however, is ultimately responsible for causing routines to be loaded into memory and executed together to produce the program's overall functionality.

163. Routines can be packaged together into files in almost any way the designer chooses. Routines need not reside in the same file to function together in a seamless fashion. Also, a developer can move routines into new or different files from one version of a program to another without changing the functionalities of those routines or the ability to combine them to provide integrated functionality.

164. Starting with Windows 95 OSR 2, Microsoft placed many of the routines that are used by Internet

Explorer, including browsing-specific routines, into the same files that support the 32-bit Windows APIs. Microsoft's primary motivation for this action was to ensure that the deletion of any file containing browsing-specific routines would also delete vital operating system routines and thus cripple Windows 95. Although some of the code that provided Web browsing could still be removed, without disabling the operating system, by entering individual files and selectively deleting routines used only for Web browsing, licensees of Microsoft software were, and are, contractually prohibited from reverse engineering, decompiling, or disassembling any software files. Even if this were not so, it is prohibitively difficult for anyone who does not have access to the original, human-readable source code to change the placement of routines into files, or otherwise to alter the internal configuration of software files, while still preserving the software's overall functionality.

165. Although users were not able to remove all of the routines that provided Web browsing from OSR 2 and successive versions of Windows 95, Microsoft still provided them with the ability to uninstall Internet Explorer by using the "Add/Remove" panel, which was accessible from the Windows 95 desktop. The Add/Remove function did not delete all of the files that contain browsing specific code, nor did it remove browsing-specific code that is used by other programs. The Add/Remove function did, however, remove the functionalities that were provided to the user by Internet Explorer, including the means of launching the Web browser. Accordingly, from the user's perspective, uninstalling Internet Explorer in this way was equivalent to removing the Internet Explorer program from Windows 95.

166. In late 1996, senior executives within Microsoft, led by James Allchin, began to argue that Microsoft was not binding Internet Explorer tightly enough to Windows and as such was missing an opportunity to maximize the usage of

Internet Explorer at Navigator's expense. Allchin first made his case to Paul Maritz in late December 1996. He wrote:

> I don't understand how IE is going to win. The current path is simply to copy everything that Netscape does packaging and product wise. Let's [suppose] IE is as good as Navigator/Communicator. Who wins? The one with 80% market share. Maybe being free helps us, but once people are used to a product it is hard to change them. Consider Office. We are more expensive today and we're still winning. My conclusion is that we must leverage Windows more. Treating IE as just an add-on to Windows which is cross-platform [means] losing our biggest advantage—Windows marketshare. We should dedicate a cross group team to come up with ways to leverage Windows technically more. . . . We should think about an integrated solution—that is our strength.

Allchin followed up with another message to Maritz on January 2, 1997:

> You see browser share as job 1. . . . I do not feel we are going to win on our current path. We are not leveraging Windows from a marketing perspective and we are trying to copy Netscape and make IE into a platform. We do not use our strength—which is that we have an installed base of Windows and we have a strong OEM shipment channel for Windows. Pitting browser against browser is hard since Netscape has 80% marketshare and we have <20%. . . . I am convinced we have to use Windows—this is the one thing they don't have. . . . We have to be competitive with features, but we need something more—Windows integration.

> If you agree that Windows is a huge asset, then it follows quickly that we are not investing sufficiently in finding ways to tie IE and Windows together. This must come from you. . . . Memphis [Microsoft's code-name for Windows 98] must be a simple upgrade, but most importantly it must be killer on OEM shipments so that Netscape never gets a chance on these systems.

167. Maritz responded to Allchin's second message by agreeing "that we have to make Windows integration our basic strategy" and that this justified delaying the release of Windows 98 until Internet Explorer 4.0 was ready to be included with that product. Maritz recognized that the delay would disappoint OEMs for two reasons. First, while OEMs were eager to sell new hardware technologies to Windows users, they could not do this until Microsoft released Windows 98, which included software support for the new technologies. Second, OEMs wanted Windows 98 to be released in time to drive sales of PC systems during the back-to-school and holiday selling seasons. Nevertheless, Maritz agreed with Allchin's point that synchronizing the release of Windows 98 with Internet Explorer was "the only thing that makes sense even if OEMs suffer."

168. Once Maritz had decided that Allchin was right, he needed to instruct the relevant Microsoft employees to delay the release of Windows 98 long enough so that it could be shipped with Internet Explorer 4.0 tightly bound to it. When one executive asked on January 7, 1997 for confirmation that "memphis is going to hold for IE4, even if it puts memphis out of the xmas oem window," Maritz responded affirmatively and explained,

> The major reason for this is . . . to combat Nscp, we have to [] position the browser as "going away" and do deeper integration on Windows. The stronger way to communicate this is to

> have a 'new release' of Windows and make a big deal out of it. . . . IE integration will be [the] most compelling feature of Memphis.

Thus, Microsoft delayed the debut of numerous features, including support for new hardware devices, that Microsoft believed consumers would find beneficial, simply in order to protect the applications barrier to entry.

169. Allchin and Maritz gained support for their initiative within Microsoft in the early spring of 1997, when a series of market studies confirmed that binding Internet Explorer tightly to Windows was the way to get consumers to use Internet Explorer instead of Navigator. Reporting on one study in late February, Microsoft's Christian Wildfeuer wrote:

> The stunning insight is this: To make [users] switch away from Netscape, we need to make them upgrade to Memphis. . . . It seems clear to me that it will be very hard to increase browser market share on the merits of IE 4 alone. It will be more important to leverage the OS asset to make people use IE instead of Navigator.

Microsoft's survey expert, Kumar Mehta, agreed. In March he shared with a colleague his "feeling, based on all the IE research we have done, [that] it is a mistake to release memphis without bundling IE with it."

170. Microsoft's technical personnel implemented Allchin's "Windows integration" strategy in two ways. First, they did not provide users with the ability to uninstall Internet Explorer from Windows 98. The omission of a browser removal function was particularly conspicuous given that Windows 98 did give users the ability to uninstall numerous features other than Internet Explorer—features that Microsoft also held out as being integrated into Windows 98. Microsoft took this action despite specific

requests from Gateway that Microsoft provide a way to uninstall Internet Explorer 4.0 from Windows 98.

171. The second way in which Microsoft's engineers implemented Allchin's strategy was to make Windows 98 override the user's choice of default browser in certain circumstances. As shipped to users, Windows 98 has Internet Explorer configured as the default browser. While Windows 98 does provide the user with the ability to choose a different default browser, it does not treat this choice as the "default browser" within the ordinary meaning of the term. Specifically, when a user chooses a browser other than Internet Explorer as the default, Windows 98 nevertheless requires the user to employ Internet Explorer in numerous situations that, from the user's perspective, are entirely unexpected. As a consequence, users who choose a browser other than Internet Explorer as their default face considerable uncertainty and confusion in the ordinary course of using Windows 98.

172. Microsoft's refusal to respect the user's choice of default browser fulfilled Brad Chase's 1995 promise to make the use of any browser other than Internet Explorer on Windows "a jolting experience." By increasing the likelihood that using Navigator on Windows 98 would have unpleasant consequences for users, Microsoft further diminished the inclination of OEMs to pre-install Navigator onto Windows. The decision to override the user's selection of non-Microsoft software as the default browser also directly disinclined Windows 98 consumers to use Navigator as their default browser, and it harmed those Windows 98 consumers who nevertheless used Navigator. In particular, Microsoft exposed those using Navigator on Windows 98 to security and privacy risks that are specific to Internet Explorer and to ActiveX controls.

173. Microsoft's actions have inflicted collateral harm on consumers who have no interest in using a Web browser at all. If these consumers want the non-browsing features

available only in Windows 98, they must content themselves with an operating system that runs more slowly than if Microsoft had not interspersed browsing-specific routines throughout various files containing routines relied upon by the operating system. More generally, Microsoft has forced Windows 98 users uninterested in browsing to carry software that, while providing them with no benefits, brings with it all the costs associated with carrying additional software on a system. These include performance degradation, increased risk of incompatibilities, and the introduction of bugs. Corporate consumers who need the hardware support and other non-browsing features not available in earlier versions of Windows, but who do not want Web browsing at all, are further burdened in that they are denied a simple and effective means of preventing employees from attempting to browse the Web.

174. Microsoft has harmed even those consumers who desire to use Internet Explorer, and no other browser, with Windows 98. To the extent that browsing-specific routines have been commingled with operating system routines to a greater degree than is necessary to provide any consumer benefit, Microsoft has unjustifiably jeopardized the stability and security of the operating system. Specifically, it has increased the likelihood that a browser crash will cause the entire system to crash and made it easier for malicious viruses that penetrate the system via Internet Explorer to infect non-browsing parts of the system.

iii. Lack of Justification

175. No technical reason can explain Microsoft's refusal to license Windows 95 without Internet Explorer 1.0 and 2.0. The version of Internet Explorer (1.0) that Microsoft included with the original OEM version of Windows 95 was a separable, executable program file supplied on a separate disk. Web browsing thus could be installed or removed without affecting the rest of Windows 95's functionality in any way. The same was true of Internet Explorer 2.0.

Microsoft, moreover, created an easy way to remove Internet Explorer 1.0 and 2.0 from Windows 95 after they had been installed, via the "Add/Remove" panel. This demonstrates the absence of any technical reason for Microsoft's refusal to supply Windows 95 without Internet Explorer 1.0 and 2.0.

176. Similarly, there is no technical justification for Microsoft's refusal to license Windows 95 to OEMs with Internet Explorer 3.0 or 4.0 uninstalled, or for its refusal to permit OEMs to uninstall Internet Explorer 3.0 or 4.0. Microsoft's decision to provide users with an "uninstall" procedure for Internet Explorer 3.0 and 4.0 and its decision to promote Internet Explorer on the basis of that feature demonstrate that there was no technical or quality-related reason for refusing to permit OEMs to use this same feature. Microsoft would not have permitted users to uninstall Internet Explorer, nor would consumers have demanded such an option, if the process would have fragmented or degraded the other functionality of the operating system.

177. As with Windows 95, there is no technical justification for Microsoft's refusal to meet consumer demand for a browserless version of Windows 98. Microsoft could easily supply a version of Windows 98 that does not provide the ability to browse the Web, and to which users could add the browser of their choice. Indicative of this is the fact that it remains possible to remove Web browsing functionality from Windows 98 without adversely affecting non-Web browsing features of Windows 98 or the functionality of applications running on the operating system. In fact, the revised version of Professor Felten's prototype removal program produces precisely this result when run on a computer with Windows 98 installed.

178. In his direct testimony, Felten provides a full technical description of what his prototype removal program does. This description includes a list of the twenty-one methods of initiating Web browsing in Windows 98 that were known to Felten when he developed his program.

When the revised version of Felten's program is run on a computer with Windows 98 and no other software installed, Web browsing is not initiated in response to any of these methods.

179. James Allchin tried to show at trial, by way of a videotaped demonstration, that the functionality of Internet Explorer could still be enabled, even after the prototype removal program had been run, by manually adding a new entry to the Windows Registry database. During Felten's rebuttal testimony, one of Microsoft's attorneys directed Felten to perform a second demonstration intended to show that the functionality of Internet Explorer could still be enabled, even after the prototype removal program had been run, by hitting the "Control" and "N" keys simultaneously after running the Windows Update feature. Neither of these methods of initiating Web browsing was among the twenty-one documented methods known to Felten when he developed his program. Furthermore, the latter demonstration was hardly a reliable test of Felten's program, because the Encompass shell browser and other applications had been installed on the Windows 98 PC system used in the demonstration. At most, the two demonstrations indicate that Felten did not know all of the methods of initiating Web browsing in Windows 98 when he developed his program, and that he did not include steps in his program to prevent the invocation of Internet Explorer's functionality in response to methods of which he was unaware. Microsoft has special knowledge of its own products, and it alone chooses which functionalities in its products are to be documented and which are to be left undocumented. Felten was aware of this fact, and he himself noted that his own documentation of initiation methods was not exhaustive.

180. Allchin also attempted to show that Felten's program causes performance degradations in Windows 98, as well as malfunctions in certain Windows 98 applications and the Windows Update feature of Windows 98. Those

demonstrations, however, were performed on a PC on which several third-party software programs had been installed in addition to Windows 98, and which had been connected to the Internet via a dial-up connection. Felten's program was not intended to be definitive and had not been verified under preconditions other than those for which it was designed. Thus, there was no reason to expect that his program would operate flawlessly during Allchin's demonstrations, and nothing can be inferred from any failure to do so.

181. In fact, the revised version of Felten's program does not degrade the performance or stability of Windows 98 in any way. To the contrary, according to several standard programs used by Microsoft to measure system performance, the removal of Internet Explorer by the prototype program slightly improves the overall speed of Windows 98.

182. Given Microsoft's special knowledge of its own products, the company is readily able to produce an improved implementation of the concept illustrated by Felten's prototype removal program. In particular, Microsoft can easily identify browsing-specific code that could be removed from shared files, thereby reducing the operating system's memory and hard disk requirements and obtaining performance improvements even beyond those achieved by Felten.

183. Microsoft contends that Felten's prototype removal program does not remove Internet Explorer's Web browsing functionalities, but rather "hides" those functionalities from the perspective of the user. In support of that contention, Microsoft points out that Felten's program removes only a small fraction of the code in Windows 98, so that the hard drive still contains almost all of the code that had been executed in the course of providing Internet Explorer's Web browsing functionalities. Some of that code is left on the hard drive because it also supports Windows 98's operating system functionalities. Microsoft did not offer any analytical basis, however, for distinguishing this sharing

of code from the code sharing that exists between all Windows applications and the operating system functionalities in Windows 98.

184. While Microsoft's observation suggests that Felten's program does not greatly reduce Windows 98's "footprint" on the hard disk, that point is irrelevant to the question of whether Felten's program removes Internet Explorer's functionalities from Windows 98. This is because the functionalities of a software product are not provided by the mere presence of code on a computer's hard drive. For software code to provide any functionalities at all the code must be loaded into the computer's dynamic memory and executed. To uninstall a software program or to remove a set of functionalities from a software program, it is not necessary to delete all of the software code that is executed in the course of providing those functionalities. It is sufficient to delete and/or modify enough of the program so as to prevent the code in question from being executed.

185. This deletion and modification is precisely what Felten's program does to Windows 98. After Felten's program has been run, the software code that formerly had been executed in the course of providing Web browsing functionalities is no longer executed. Web browsing functionalities are not merely "hidden" from the user. To the contrary, Felten's program deletes and modifies enough of Windows 98 so as to prevent the necessary code from being executed altogether. Since code that is not to be executed does not need to be loaded into memory, Felten's program is able to reduce the memory allocated to Windows 98 by approximately twenty percent.

186. As an abstract and general proposition, many—if not most—consumers can be said to benefit from Microsoft's provision of Web browsing functionality with its Windows operating system at no additional charge. No consumer benefit can be ascribed, however, to Microsoft's refusal to offer a version of Windows 95 or Windows 98

without Internet Explorer, or to Microsoft's refusal to provide a method for uninstalling Internet Explorer from Windows 98. In particular, Microsoft's decision to force users to take the browser in order to get the non-Web browsing features of Windows 98, including support for new Internet protocols and data formats is, as Allchin put it, simply a choice about "distribution."

187. As Felten's program demonstrated, it is feasible for Microsoft to supply a version of Windows 98 that does not provide the ability to browse the Web, to which users could add a browser of their choice. Microsoft could then readily offer "integrated" Internet Explorer Web browsing functionality as well, either as an option that could be selected by the end user or the OEM during the Windows 98 setup procedure, or as a "service pack upgrade."

188. Unlike a "pocket part" supplement to a book, a software upgrade need not consist only of new material. A service pack upgrade may install a combination of new software files and/or replacements for existing software files. The use of such service packs to distribute new functionality is a standard feature of Windows applications generally. Microsoft could offer "integrated" Internet Explorer Web browsing functionality as a service pack upgrade that would locate the relevant software and replace it with the current Windows 98 software. In this way, any consumer who wished to do so could easily acquire all of the functionality, features, and performance of the current version of Windows 98 by obtaining the browserless operating system package and the service pack upgrade and then installing them together.

189. Microsoft contends that a service pack must necessarily be deemed part of the operating system when it replaces and adds a large number of core operating system files in the process of upgrading the operating system to a higher level of functionality. This contention is false. Both Microsoft Word, an application program, and Norton

Utilities, a suite of utility and application programs, replace and add files to Windows without thereby becoming part of the operating system.

190. Microsoft's actual use of a service pack upgrade to offer integrated Internet Explorer Web browsing functionality (Internet Explorer 4.0) separately from the Windows 95 operating system illustrates the feasibility of this approach. In fact, it produces results remarkably similar to those that could be achieved by offering integrated Internet Explorer Web browsing functionality as a separate service pack upgrade to a browserless Windows 98 operating system. When installed together by the end user, the combined software provides nearly all of the features that Microsoft attributes to the "integrated" design of Windows 98. Of the missing features, all but WebTV for Windows can be obtained by thereafter installing a separately obtained copy of Internet Explorer 5.0. Microsoft has presented no evidence that the WebTV functionality could not easily be included in the stand-alone version of Internet Explorer 5.0.

191. Therefore, Microsoft could offer consumers all the benefits of the current Windows 98 package by distributing the products separately and allowing OEMs or consumers themselves to combine the products if they wished. In fact, operating system vendors other than Microsoft currently succeed in offering "integrated" features similar to those that Microsoft advertises in Windows 98 while still permitting the removal of the browser from the operating system. If consumers genuinely prefer a version of Windows bundled with Internet Explorer, they do not have to be forced to take it; they can choose it in the market.

192. Windows 98 offers some benefits unrelated to browsing that a consumer cannot obtain by combining Internet Explorer with Windows 95. For example, Windows 98 includes support for new hardware technologies and data formats that consumers may desire. Microsoft has forced Windows users who do not want Internet Explorer to

nevertheless license, install, and use Internet Explorer in order to obtain these unrelated benefits. Although some consumers might be inclined to go without Windows 98's new non-browsing features in order to avoid Internet Explorer, OEMs are unlikely to facilitate that choice, because they want consumers to use an operating system that supports the new hardware technologies they seek to sell.

193. Microsoft's argument that binding the browser to the operating system is reasonably necessary to preserve the "integrity" of the Windows platform is likewise specious. First, concern with the integrity of the platform cannot explain Microsoft's original decision to bind Internet Explorer to Windows 95, because Internet Explorer 1.0 and 2.0 did not contain APIs. Second, concern with the integrity of the platform cannot explain Microsoft's refusal to offer OEMs the option of uninstalling Internet Explorer from Windows 95 and Windows 98 because APIs, like all other shared files, are left on the system when Internet Explorer is uninstalled. Third, Microsoft's contention that offering OEMs the choice of whether or not to install certain browser-related APIs would fragment the Windows platform is unpersuasive because OEMs operate in a competitive market and thus have ample incentive to include APIs (including non-Microsoft APIs) required by the applications that their customers demand. Fourth, even if there were some potential benefit associated with the forced licensing of a single set of APIs to all OEMs, such justification could not apply in this case, because Microsoft itself precipitates fragmentation of its platform by continually updating various portions of the Windows installed base with new APIs. ISVs have adapted to this reality by redistributing needed APIs with their applications in order to ensure that the necessary APIs are present when the programs are launched. To the same end, Microsoft makes the APIs it ships with Internet Explorer available to third-party developers for distribution with their own products. Moreover, Microsoft itself bundles APIs—including those distributed with Internet Explorer—

with a number of the applications that it distributes separately from Windows.

194. Microsoft also contends that by providing "best of breed" implementations of various functionalities, a vendor of a popular operating system can benefit consumers and improve the efficiency of the software market generally, because the resulting standardization allows ISVs to concentrate their efforts on developing complementary technologies for the industry leaders. Microsoft's refusal to offer a version of Windows 98 in which its Web browser is either absent or removable, however, had no such purpose. Rather, it had the purpose and effect of quashing innovation that exhibited the potential to facilitate the emergence of competition in the market for Intel-compatible PC operating systems.

195. Furthermore, there is only equivocal support for the proposition that Microsoft will ultimately prove to be the source of a "best of breed" Web browser. In fact, there is considerable evidence to the contrary. Both Microsoft and the plaintiffs have used product evaluations to support their claims about the relationship between innovations in Web browser technology and consumer choices regarding the use of Web browsers. These product evaluations generally compare Internet Explorer with Navigator by identifying the beneficial and detrimental features of each. Because the evaluations disagree as to which features are most important, there is no consensus as to which is the best browser overall. When read together, the evaluations also do not identify any existing Web browser as being "best of breed" in the sense of being at least as good as all others in all significant respects. Moreover, there is nothing in the evaluations, nor anywhere else in the evidence, to suggest that further innovation efforts by vendors other than Microsoft in the field of Web browser technology are no longer necessary or desirable. To the contrary, many of the product reviews

suggest further innovations in both Microsoft and non-Microsoft Web browsers that would benefit consumers.

196. Despite differences in emphasis, the product evaluations do generally concur as to which browser features are beneficial, which browser features are detrimental, and why. Thus, the evaluations provide extensive detailed information about consumer preferences that can be used to predict likely directions in the evolution of Web browser technology.

197. First, the evaluations suggest that, although most Web publishers charge nothing for access to their sites, consumers recognize that there are search and communication costs associated with Web transactions. Accordingly, consumers prefer, and benefit from, innovations in Web browser technology that reduce these costs. Second, consumers recognize that the Web contains a vast and growing range of digital information resources, many of which contain viruses that are capable of causing devastating and irreversible harm to their security and privacy interests. Accordingly, consumers prefer, and benefit from, innovations in Web browser technology that help them identify and avoid harmful Web resources. Third, consumers recognize that they frequently lack adequate information to enable them to assess accurately the costs, risks, and benefits of performing a particular Web transaction. Accordingly, consumers prefer, and benefit from, innovations in Web browser technology that help them assess these costs, risks, and benefits prior to performing the transaction.

198. The reduction of search and communication costs, the identification and avoidance of harmful Web resources, and the provision of more accurate information as to the costs, risks, and benefits of performing Web transactions are just three of the many possible areas of innovation in the field of Web browser technology. Far from demonstrating that Internet Explorer is currently a "best of breed" Web browser, the evidence reveals Microsoft's

awareness of the need for continuous improvement of its products. For example, Microsoft frequently releases "patches" to address security and privacy vulnerabilities in Internet Explorer as they are discovered. In sum, there is no indication that Microsoft is destined to provide a "best of breed" Web browser that makes continuing, competitively driven innovations unproductive.

iv. The Market for Web Browsing Functionality

199. Since the World Wide Web was introduced to the public in 1991, the resources available on the Web have multiplied at a near-exponential rate. The Internet is becoming a true mass medium. Every day Web resources are published, combined, modified, moved, and deleted. Millions of individuals and organizations have published Web sites, and Web site addresses are pervasive in advertising, promotion, and corporate identification.

200. The economics of the Internet, along with the flexible structure of Web pages, have made the Web the leading trajectory for the ongoing convergence of mass communications media. Many television and radio stations make some or all of their transmissions available on the Web in the form of static multimedia files or streaming media. Many newspapers, magazines, books, journals, public documents, and software programs are also published on the Web. Multimedia files on the Web have emerged as viable substitutes for many pre-recorded audio and video entertainment products. Web-based E-mail, discussion lists, news groups, "chat rooms," paging, instant messaging, and telephony are all in common use. In addition to subsuming all other digital media, the Web also offers popular interactive and collaborative modes of communication that are not available through other media.

201. The use of Web browsers to conduct Web transactions has grown at pace with the growth of the Web,

reflecting the immense value that subsists in the digital information resources that have become available on the Web. Consumer demand for software functionality that facilitates Web transactions, and the response by browser vendors to that demand, creates a market for Web browsing functionality. Although Web browsers are now generally not licensed at a positive price, all Web transactions impose significant costs on consumers, and all browser vendors, including Microsoft, have significant economic interests in maximizing usage of the browsing functionality they control.

b. Preventing OEMs from Removing the Ready Means of Accessing Internet Explorer and from Promoting Navigator in the Boot Sequence

202. Since the release of Internet Explorer 1.0 in July 1995, Microsoft has distributed every version of Windows with Internet Explorer included. Consequently, no OEM has ever (with the exception of a few months in late 1997) been able to license a copy of Windows 95 or Windows 98 that has not come with Internet Explorer. Refusing to offer OEMs a browserless (and appropriately discounted) version of Windows forces OEMs to take (and pay for) Internet Explorer, but it does not prevent a determined OEM from nevertheless offering its consumers a different Web browser. Even Microsoft's additional refusal to allow OEMs to uninstall (without completely removing) Internet Explorer from Windows does not completely foreclose a resourceful OEM from offering consumers another browser. For example, an OEM with sufficient technical expertise (which all the larger OEMs certainly possess) could offer its customers a choice of browsers while still minimizing user confusion if the OEM were left free to configure its systems to present this choice the first time a user turned on a new PC system. If the user chose Navigator, the system would automatically remove the most prominent means of

accessing Internet Explorer from Windows (without actually uninstalling, i.e., removing all means of accessing, Internet Explorer) before the desktop screen appeared for the first time.

203. If OEMs removed the most visible means of invoking Internet Explorer, and pre-installed Navigator with facile methods of access, Microsoft's purpose in forcing OEMs to take Internet Explorer—capturing browser usage share from Netscape—would be subverted. The same would be true if OEMs simply configured their machines to promote Navigator before Windows had a chance to promote Internet Explorer. Decision-makers at Microsoft believed that as Internet Explorer caught up with Navigator in quality, OEMs would ultimately conclude that the costs of pre-installing and promoting Navigator, and removing easy access to Internet Explorer, outweighed the benefits. Still, those decision-makers did not believe that Microsoft could afford to wait for the several large OEMs that represented virtually all Windows PCs shipped to come to this desired conclusion on their own. Therefore, in order to bring the behavior of OEMs into line with its strategic goals quickly, Microsoft threatened to terminate the Windows license of any OEM that removed Microsoft's chosen icons and program entries from the Windows desktop or the "Start" menu. It threatened similar punishment for OEMs that added programs that promoted third-party software to the Windows "boot" sequence. These inhibitions soured Microsoft's relations with OEMs and stymied innovation that might have made Windows PC systems more satisfying to users. Microsoft would not have paid this price had it not been convinced that its actions were necessary to ostracize Navigator from the vital OEM distribution channel.

204. Although Microsoft's original Windows 95 licenses withheld from OEMs permission to implement any modifications to the Windows product not expressly authorized by Microsoft's "OEM Pre-Installation Kit," or

"OPK," it had always been Microsoft's practice to grant certain OEMs requesting it some latitude to make modifications not specified in the OPK. But when OEMs began, in the summer of 1995, to request permission to remove the Internet Explorer icon from the Windows desktop prior to shipping their PCs, Microsoft consistently and steadfastly refused. As Compaq learned in the first half of 1996, Microsoft was prepared to enforce this prohibition against even its closest OEM allies.

205. In August 1995, Compaq entered into a "Promotion and Distribution Agreement" with AOL whereby Compaq agreed to "position AOL Services above all other Online Services within the user interface of its Products." An addendum to the agreement provided that Compaq would place an AOL icon—and no OLS icons not controlled by AOL—on the desktop of its PCs. Pursuant to its obligations, Compaq began in late 1995 or early 1996 to ship its Presario PCs with the MSN icon removed and the AOL icon added to the Windows desktop. At the same time, Compaq removed the Internet Explorer icon from the desktop of its Presarios and replaced it with a single icon representing both the Spry ISP and the browser product that Spry bundled, *i.e.*, Navigator. Compaq added this icon in part because it recognized Navigator to be the most popular browser product with its consumers; it removed the Internet Explorer icon because it did not want its PCs desktops to confuse novice users with a clutter of Internet-related icons.

206. When Microsoft learned of Compaq's plans for the Presario, it informed Compaq that it considered the removal of the MSN and Internet Explorer icons to be a violation of the OPK process by which Compaq had previously agreed to abide. For its part, AOL informed Compaq that it viewed the addition of an icon for Spry as a violation of their 1995 agreement. AOL did not object to the presence of a Navigator icon; what concerned AOL was the fact that clicking on this icon brought the user to the Spry

ISP. Despite the protests from Microsoft and AOL, Compaq refused to reconfigure the Presario desktop. Finally, after months of unsuccessful importunity, Microsoft sent Compaq a letter on May 31, 1996, stating its intention to terminate Compaq's license for Windows 95 if Compaq did not restore the MSN and Internet Explorer icons to their original positions. Compaq's executives opined that their firm could not continue in business for long without a license for Windows, so in June Compaq restored the MSN and IE icons to the Presario desktop.

207. Microsoft did not further condition its withdrawal of the termination notice on the removal of the AOL and Navigator icons; AOL, however, did protest both the continued presence of a Spry icon and the reappearance of the MSN icon. After AOL sent Compaq a formal notice of its intent to terminate the Promotion and Distribution Agreement in September 1996, Compaq removed the Spry/Navigator icon. For reasons discussed below, Compaq did not then replace the Spry/Navigator icon with an icon solely for Navigator.

208. In its confrontation with Compaq, Microsoft demonstrated that it was prepared to go to the brink of losing all Windows sales through its highest-volume OEM partner in order to enforce its prohibition against removing Microsoft's Internet-related icons from the Windows desktop.

209. If the only prohibition had been against removing Microsoft icons and program entries, OEMs partial to Navigator still would have been able to recruit users to Navigator by configuring their PCs to promote it before the Windows desktop first presented itself. This is true because the average user, having chosen a browser product, is indisposed to undergo the trouble of switching to a different one. With the release of Windows 95, some of the high-volume OEMs began to customize the Windows boot sequence so that, the first time users turned on their new

PCs, certain OEM-designed tutorials and registration programs, as well as "splash" screens that simply displayed the OEM's brand, would run before the users were presented with the Windows desktop.

210. Promoting non-Microsoft software and services was not the only, or even the primary, purpose of the OEM introductory programs. The primary purpose, rather, was to make the experience of setting up and learning to use a new PC system easier and less confusing for users, especially novices. By doing so, the OEMs believed, they would increase the value of their systems and minimize both product returns and costly support calls. Since just three calls from a consumer can erase the entire profit that an OEM earned selling a PC system to that consumer, OEMs have an acute interest in making their systems self-explanatory and simple to use. A secondary purpose motivating OEMs to insert programs into the boot sequence was to differentiate their products from those of their competitors. Finally, OEMs perceived an opportunity to collect bounties from IAPs and ISVs in exchange for the promotion of their services and software in the boot sequence. Thus, among the programs that many OEMs inserted into the boot sequence were Internet sign-up procedures that encouraged users to choose from a list of IAPs assembled by the OEM. In many cases, a consumer signing up for an IAP through an OEM program would automatically become a user of whichever browser that IAP bundled with its proprietary software. In other cases, the IAP would present the user with a choice of browsers in the course of collecting from the user the information necessary to start a subscription.

211. In addition to tutorials, sign-up programs, and splash screens, a few large OEMs developed programs that ran automatically at the conclusion of a new PC system's first boot sequence. These programs replaced the Windows desktop either with a user interface designed by the OEM or with Navigator's user interface. The OEMs that implemented

automatically loading alternative user interfaces did so out of the belief that many users, particularly novice ones, would find the alternate interfaces less complicated and confusing than the Windows desktop.

212. When Gates became aware of what the OEMs were doing, he expressed concern to Kempin, the Microsoft executive in charge of OEM sales. On January 6, 1996, Gates wrote to Kempin: "Winning Internet browser share is a very very important goal for us. Apparently a lot of OEMs are bundling non-Microsoft browsers and coming up with offerings together with Internet Service providers that get displayed on their machines in a FAR more prominent way than MSN or our Internet browser." Less than three weeks later, Kempin delivered his semi-annual report on OEM sales to his superiors. In the report, he identified "Control over start-up screens, MSN and IE placement" as one interest that Microsoft had neglected over the previous six months. The ongoing imbroglio with Compaq was prominent in Kempin's thinking, but he also recognized that establishing control over the boot process was necessary to ensure preferential positioning for MSN and Internet Explorer.

213. In an effort to thwart the practice of OEM customization, Microsoft began, in the spring of 1996, to force OEMs to accept a series of restrictions on their ability to reconfigure the Windows 95 desktop and boot sequence. There were five such restrictions, which were manifested either as amendments to existing Windows 95 licenses or as terms in new Windows 98 licenses. First, Microsoft formalized the prohibition against removing any icons, folders, or "Start" menu entries that Microsoft itself had placed on the Windows desktop. Second, Microsoft prohibited OEMs from modifying the initial Windows boot sequence. Third, Microsoft prohibited OEMs from installing programs, including alternatives to the Windows desktop user interface, which would launch automatically upon completion of the initial Windows boot sequence. Fourth,

Microsoft prohibited OEMs from adding icons or folders to the Windows desktop that were not similar in size and shape to icons supplied by Microsoft. Finally, when Microsoft later released the Active Desktop as part of Internet Explorer 4.0, it added the restriction that OEMs were not to use that feature to display third-party brands.

214. The several OEMs that in the aggregate represented over ninety percent of Intel-compatible PC sales believed that the new restrictions would make their PC systems more difficult and more confusing to use, and thus less acceptable to consumers. They also anticipated that the restrictions would increase product returns and support costs and generally lower the value of their machines. Those OEMs that had already spent millions of dollars developing and implementing tutorial and registration programs and/or automatically-loading graphical interfaces in the Windows boot sequence lamented that their investment would, as a result of Microsoft's policy, be largely wasted. Gateway, Hewlett-Packard, and IBM communicated their opposition forcefully and urged Microsoft to lift the restrictions. Emblematic of the reaction among large OEMs was a letter that the manager of research and development at Hewlett-Packard sent to Microsoft in March 1997. He wrote:

> Microsoft's mandated removal of all OEM boot-sequence and auto-start programs for OEM licensed systems has resulted in significant and costly problems for the HP-Pavilion line of retail PC's.
>
> Our data (as of 3/10/97) shows a 10% increase in W[indows]95 calls as a % of our total customer support calls . . . .
>
> Our registration rate has also dropped from the mid-80% range to the low 60% range.
>
> There is also subjective data from several channel partners that our system return rate has

increased from the lowest of any OEM (even lower than Apple) to a level comparable to the other Microsoft OEM PC vendors. This is a major concern in that we are taking a step backward in meeting customer satisfaction needs.

These three pieces of data confirm that we have been damaged by the edicts that [] Microsoft issued last fall. . . .

From the consumer perspective, we are hurting our industry and our customers. PC's can be frightening and quirky pieces of technology into which they invest a large sum of their money. It is vitally important that the PC suppliers dramatically improve the consumer buying experience, out of box experience as well as the longer term product usability and reliability. The channel feedback as well as our own data shows that we are going in the wrong direction. This causes consumer dissatisfaction in complex telephone support process, needless in-home repair visits and ultimately in product returns. Many times the cause is user misunderstanding of a product that presents too much complexity to the common user. . . .

Our Customers hold HP accountable for their dissatisfaction with our products. We bear [] the cost of returns of our products. We are responsible for the cost of technical support of our customers, including the 33% of calls we get related to the lack of quality or confusion generated by your product. And finally we are responsible for our success or failure in the retail PC market.

We must have more ability to decide how our system is presented to our end users.

If we had a choice of another supplier, based on your actions in this area, I assure you [that you] would not be our supplier of choice.

I strongly urge you to have your executives review these decisions and to change this unacceptable policy.

215. Even in the face of such strident opposition from its OEM customers, Microsoft refused to relent on the bulk of its restrictions. It did, however, grant Hewlett-Packard and other OEMs discounts off the royalty price of Windows as compensation for the work required to bring their respective alternative user interfaces into compliance with Microsoft's requirements. Despite the high costs that Microsoft's demands imposed on them, the OEMs obeyed the restrictions because they perceived no alternative to licensing Windows for pre-installation on their PCs. Still, the restrictions lowered the value that OEMs attached to Windows by the amount of the costs that the restrictions imposed on them. Furthermore, Microsoft's intransigence damaged the goodwill between it and several of the highest-volume OEMs.

216. Microsoft was willing to sacrifice some goodwill and some of the value that OEMs attached to Windows in order to exclude Netscape from the crucial OEM distribution channel. Microsoft's restrictions succeeded in raising the costs to OEMs of pre-installing and promoting Navigator. These increased costs, in turn, were in some cases significant enough to deter OEMs from pre-installing Navigator altogether. In other cases, as is discussed in the next section, OEMs decided not to pre-install Navigator after Microsoft brought still more pressure to bear.

217. Microsoft's license agreements have never prohibited OEMs from pre-installing programs, including

Navigator, on their PCs and placing icons and entries for those programs on the Windows desktop and in the "Start" menu. The icons and entries that Microsoft itself places on the desktop and in the "Start" menu have always left room for OEMs to insert more icons and program entries of their own choosing. In fact, Microsoft leaves enough space for an OEM to add more than forty icons to the Windows desktop. Still, the availability of space for added icons did not make including a Navigator icon inexpensive for OEMs. Given the unavoidable presence of the Internet Explorer and MSN icons, adding a Navigator icon would increase the amount of Internet-related clutter on the desktop. This would lead to confusion among novice users, which would in turn increase the incidence of support calls and product returns. Microsoft made this very point clear to OEMs in its attempts to persuade them not to pre-install Navigator on their PCs. Furthermore, OEMs recognized that including multiple Navigator icons in an attempt to draw users' attention away from Internet Explorer would only increase the amount of clutter on the desktop, thus adding to user confusion. Although the Windows 98 OEM license does not forbid the OEM to set Navigator as the default browsing software, doing so would fail to forestall user confusion since, as the Court found in the previous section, Windows 98 launches Internet Explorer in certain situations even if Navigator is set as the default.

218. The restrictions on modifying the Windows boot sequence, including the prohibition against automatically loading alternate user interfaces, deprived OEMs of the principal devices by which to lure users to Navigator over the high-profile presence of Internet Explorer in the Windows user interface. An OEM remained free to place an icon on the desktop that a user could click to invoke an alternate user interface. Plus, once invoked, the interface could be configured to load automatically the next time the PC was turned on. This mode of presentation proved to be much less effective than the one Microsoft foreclosed,

however, for studies showed that users tended not to trouble with selecting an alternate user interface; they were content to use the interface that loaded automatically the first time they turned on their PCs. Furthermore, while Microsoft's restrictions never extended to the interval between the time when the PC was turned on and the time when Windows began loading from the hard drive into RAM, developing anything more complicated than a simple splash screen to run in that period would have involved, at a minimum, the writing of a DOS utility and, at the maximum, the pre-installation of a second operating system. Such measures were simply not worth the cost. Finally, although the Windows 98 license does not prohibit an OEM from including on the keyboard of its PCs a button that takes users directly to an OEM-maintained site containing promotion for Navigator, such a configuration is extremely costly for an OEM to implement, and it represents a less effective form of promotion than automatically advertising Navigator in the initial boot process.

219. In the spring of 1998, Microsoft began gradually to moderate certain of the restrictions described above. The first sign of relaxation came when Microsoft permitted some fifty OEMs to include ISPs of their choice in Microsoft's Internet Connection Wizard. Then, in late May and early June 1998, Microsoft informed seven of the highest-volume OEMs that it was granting them the privilege of inserting their own registration and Internet sign-up programs into the initial Windows 98 boot sequence. If the user selected an IAP using the OEM program, Microsoft's Internet Connection Wizard would not run in the boot sequence. Microsoft subsequently extended these same privileges to several other OEMs, upon their request.

220. It is important to note that Microsoft's tractability emerged only after the restrictions had been in place for over a year, and only after Microsoft had managed to secure favorable promotion for Internet Explorer through the most

important IAPs. Furthermore, while Microsoft permitted the OEMs to include in their registration and sign-up programs promotions for their own products (including OEM-branded shell browsers built upon Internet Explorer) and for ISPs (but only if and when those ISPs were selected by consumers in the sign-up process), Microsoft continued to prohibit promotions for any other non-Microsoft products, including Navigator. In a single exception, Microsoft granted Gateway's request that it be permitted to give consumers who used Gateway's sign-up process and selected Gateway.net as their ISP an opportunity to choose Navigator as their browser. Microsoft granted this permission orally, and it did not extend similar privileges to any other OEMs.

221. Microsoft asserts that the restrictions it places on the ability of OEMs to modify the Windows desktop and boot sequence are merely intended to prevent OEMs from compromising the quality and consistency of Windows after the code leaves Microsoft's physical control, but before PC consumers first begin to experience the product. In truth, however, the OEM modifications that Microsoft prohibits would not compromise the quality or consistency of Windows any more than the modifications that Microsoft currently permits. Furthermore, to the extent that certain OEM modifications did threaten to impair the quality and consistency of Windows, Microsoft's response has been more restrictive than necessary to abate the threat. Microsoft would not have imposed prohibitions that burdened OEMs and consumers with substantial costs, lowered the value of Windows, and harmed the company's relations with major OEMs had it not felt that the measures were necessary to maximize Internet Explorer's share of browser usage at Navigator's expense.

222. Microsoft asserts that it restricts the freedom of OEMs to remove icons, folders, or "Start" menu entries that Microsoft places on the Windows desktop in order to ensure that consumers will enjoy ready access to the features that

Microsoft's advertising has led them to expect. The Windows trademark would be blemished, Microsoft argues, if consumers could not easily find the features that impelled them to purchase a Windows-equipped PC. At the same time that it has put forward this justification, however, Microsoft has permitted OEMs to de-activate Microsoft's Active Desktop and its associated "channels" prior to shipment. More significant is the fact that Microsoft's license agreements require OEMs to bear product support costs. So if a consumer has difficulty locating a feature that he wants to use, he will call a customer service representative employed by the OEM that manufactured his PC. Since only a few calls erase the profit earned from selling a PC system, OEMs are loathe to do anything that will lead to consumer questions and complaints. Therefore, if market research indicates that consumers want and expect to see a certain icon on the Windows desktop, OEMs will not remove it. Since OEMs share Microsoft's interest in ensuring that consumers can easily find the features they want on their Windows PC systems, Microsoft would not have prohibited OEMs from removing icons, folders, or "Start" menu entries if its only concern had been consumer satisfaction. In fact, by forbidding OEMs to remove the most obvious means of invoking Internet Explorer, Microsoft diminished the value of Windows PC systems to those corporate customers, for example, who did not intend for their employees to browse the Web and did not want a browser taking up hardware resources. Incidentally, there is no merit in the hypothesis that OEMs might cause problems in the functioning of the rest of Windows by removing Internet Explorer's desktop icon and program entry, because Microsoft still allows users to do exactly that.

223. According to Microsoft, its restrictions on the ability of OEMs to insert programs into the initial Windows boot sequence are meant to ensure that all Windows users experience the product the way Microsoft intended it the first time they turn on their PC systems; after all, there would be

little incentive to develop a high-quality operating-system product if OEMs were free to alter it for the worse before handing it over to consumers. This argument might be availing were it not for the fact that Microsoft currently allows several of the largest-volume OEMs to make major modifications to the initial Windows 98 boot sequence. Microsoft permits each of these OEMs to configure its own splash screens, tutorials, registration wizards, Internet sign-up wizards, and utilities so that they run automatically when the consumer first turns on a new PC system. Either Microsoft stopped caring about the consistency of the Windows experience in 1998, when it tempered its restrictions on modifications to the boot sequence, or preserving consistency was never Microsoft's true motivation for imposing those restrictions in the first place. With all the variety that Microsoft now tolerates in the boot sequence, including the promotion of OEM-branded browser shells, it is difficult to comprehend how allowing OEMs to promote Navigator in their tutorials and Internet sign-up programs would further compromise Microsoft's purported interest in consistency.

224. Although Microsoft has tolerated a variety of OEM modifications to the Windows boot sequence, it has never acquiesced to an alternate user interface that automatically obscures the Windows desktop after the PC system has finished booting for the first time. In demanding the removal of such automatically loading user interfaces, Microsoft has postulated that consumers who purchase Windows PCs expect to see the Windows desktop when their PC systems finish booting for the first time. If consumers instead see a different user interface, they will be confused and disappointed. What is more, Microsoft asserts, OEM shells have tended to be of lower quality than Windows. One OEM's version allegedly even disabled the ability of a Windows user to invoke functionality by clicking the right button of his mouse.

225. The alternate shells that OEMs have developed may or may not be of lower quality than Windows. One thing is clear, however: If an OEM develops a shell that users do not like as much as Windows, and if the OEM causes that shell to load as the default user interface the first time its PCs are turned on, consumer wrath will fall first upon the OEM, and demand for that OEM's PC systems will decline commensurately with the resulting user dissatisfaction. The market for Intel-compatible PCs is, by all accounts, a competitive one. Consequently, any OEM that tries to force an unwanted, low-quality shell on consumers will do so at its own peril. Had Microsoft's sole concern been consumer satisfaction, it would have relied more on the power of the market—and less on its own market power—to prevent OEMs from making modifications that lead to consumer disappointment.

226. At times, Microsoft has argued that the limitations it imposes on the ability of OEMs to modify Windows originate in a desire to prevent its platform from becoming fragmented, like UNIX. Microsoft believes that ISVs benefit from the fact that Windows presents the same platform for applications development, irrespective of the underlying hardware. Certainly, Microsoft has a legitimate interest in ensuring that OEMs do not take Windows under license, alter its API set, and then ship the altered version. This fact does not add credibility to Microsoft's stated justification, though, for two reasons. First, Microsoft itself creates some degree of instability in its supposedly uniform platform by releasing updates to Internet Explorer more frequently than it releases new versions of Windows. As things stand, ISVs find it necessary to redistribute Microsoft's Internet-related APIs with their applications because of nonuniformity that Microsoft has created in its own installed base. More important, however, is the fact that none of the modifications that OEMs are known to have proposed making would have removed or altered any Windows APIs.

227. To the extent Microsoft is apprehensive that OEMs might, absent restrictions, change the set of APIs exposed by the software on their PCs, the concern is not that OEMs would modify the Windows API set. Rather, the worry is that OEMs would pre-install, on top of Windows, other software exposing additional APIs not controlled by Microsoft. In the case of alternate user interfaces, Microsoft is fearful that, if these programs loaded automatically the first time users turned on their PCs, the programs would attract so much usage that developers would be encouraged to take advantage of any APIs that the programs exposed. Indeed, one user interface in particular that OEMs could configure to load automatically and obscure the Windows desktop—Navigator—exposes a substantial number of APIs. Therefore, Microsoft's real concern has not been that OEM modifications would fragment the Windows platform to the detriment of developers and consumers. What has motivated Microsoft's prohibition against automatically loading shells is rather the fear—once again—that OEMs would pre-install and give prominent placement to middleware that could weaken the applications barrier to entry.

228. Like most other software products, Windows 95 and Windows 98 are covered by copyright registrations. Since they are copyrighted, Microsoft distributes these products to OEMs pursuant to license agreements. By early 1998, Microsoft had made these licenses conditional on OEMs' compliance with the restrictions described above. Notwithstanding the formal inclusion of these restrictions in the license agreements, the removal of the Internet Explorer icon and the promotion of Navigator in the boot sequence would not have compromised Microsoft's creative expression or interfered with its ability to reap the legitimate value of its ingenuity and investment in developing Windows. More generally, the contemporaneous Microsoft documents reflect concern with the promotion of Navigator rather than the infringement of a copyright. Also notable is the fact that Microsoft did not adjust its OEM pricing

guidelines when it lifted certain of the restrictions in the spring of 1998.

229. Finally, it is significant that, while all vendors of PC operating systems undoubtedly share Microsoft's stated interest in maximizing consumer satisfaction, the prohibitions that Microsoft imposes on OEMs are considerably more restrictive than those imposed by other operating system vendors. For example, Apple allows its retailers to remove applications that Apple has pre-installed and to reconfigure the Mac OS desktop. For its part, IBM allows its OEM licensees to override the entire OS/2 desktop in favor of a customized shell or to set an application to start automatically the first time the PC is turned on. The reason is that these firms do not share Microsoft's interest in protecting the applications barrier to entry.

c. Pressuring OEMs to Promote Internet Explorer and to not Pre-Install or Promote Navigator

230. Microsoft's restrictions on modifications to the boot sequence and the configuration of the Windows desktop ensured that every Windows user would be presented with ready means of accessing Internet Explorer. Although the restrictions also raised the costs attendant to pre-installing and promoting Navigator, senior executives at Microsoft were not confident that those higher costs alone would induce all of the major OEMs to focus their promotional efforts on Internet Explorer to the exclusion of Navigator. Therefore, Microsoft used incentives and threats in an effort to secure the cooperation of individual OEMs.

231. First, Microsoft rewarded with valuable consideration those large-volume OEMs that took steps to promote Internet Explorer. For example, Microsoft gave reductions in the royalty price of Windows to certain OEMs, including Gateway, that set Internet Explorer as the default

browser on their PC systems. In 1997, Microsoft gave still further reductions to those OEMs that displayed Internet Explorer's logo and links to Microsoft's Internet Explorer update page on their own home pages. That same year, Microsoft agreed to give OEMs millions of dollars in co-marketing funds, as well as costly in-kind assistance, in exchange for their carrying out other promotional activities for Internet Explorer.

232. Microsoft went beyond giving OEMs incentives to promote Internet Explorer. The company's dealings with Compaq in 1996 and 1997 demonstrate that Microsoft was willing to exchange valuable consideration for an OEM's commitment to curtail its distribution and promotion of Navigator. In early 1996, at around the same time that Compaq was removing the MSN and Internet Explorer icons and program entries from the Presario desktop, Compaq announced its intention to work with Netscape for its internal Internet needs and on Internet server initiatives. In response, Microsoft insisted that Compaq support Microsoft's Internet initiatives throughout its business. To make its displeasure felt, Microsoft initiated a series of cooperative ventures with some of Compaq's competitors, including DEC and Hewlett-Packard.

233. When Compaq eventually agreed to restore the MSN and Internet Explorer icons and program entries to the Presario desktop, it did so because its senior executives had decided that the firm needed to do what was necessary to restore its special relationship with Microsoft. On May 13, 1996, Compaq signed an addendum extending the firms' Frontline Partnership to the realm of network-related products. Pursuant to the addendum, Compaq agreed to ship Internet Explorer as the default browser product on all of its desktop and server systems, to adopt and promote Internet Explorer internally, and to focus the majority of Compaq's key network-oriented announcements and marketing activities on Microsoft's technologies and strategy. In

September of the same year, Compaq agreed to offer Internet Explorer as the preferred browser product for its Internet products and to use two or more of Microsoft's hypertext markup language ("HTML") extensions in the home page for each of those products. Then in February 1997, Compaq committed itself to promote Internet Explorer exclusively for its PC products in exchange for Microsoft's agreement to pay Compaq a bounty for each user that signed up for Internet access using a Compaq PC. Despite the view of some within Compaq that the firm's goal should be "to feature the brand leader Netscape," Compaq elected not to resume the pre-installation of Navigator on its Presario PCs after it removed the joint Spry/Navigator icon. In fact, Compaq stopped pre-installing Navigator on all but very small percentage of its PCs.

234. In return for Compaq's capitulation and revival of its commitment to support Microsoft's Internet strategy, Microsoft has guaranteed Compaq that the prices it pays for Windows will continue to be significantly lower than the prices paid by other OEMs. Specifically, the operating system licenses signed by Compaq and Microsoft in March 1998 gave Compaq "[g]uaranteed better" pricing than any other OEM for Windows 95, Windows 98, and Windows NT Workstation (versions 4 and 5) until April 2000. Compaq's license fee for Windows is so low that other OEMs would still pay substantially more than Compaq even if they qualified for all of the royalty reductions listed in Microsoft's Market Development Agreements ("MDAs"). What is more, while Microsoft requires other OEMs to verify actual compliance with particular milestones in order to receive Windows 98 royalty reductions, Microsoft has secretly agreed to provide the full amount of those discounts to Compaq regardless of whether it actually satisfies the specified conditions. In addition to a guaranteed most-favorable price on Windows, Compaq has enjoyed free internal use of all Windows products for PCs since March 1998.

235. Microsoft's relations with Compaq beginning in late 1996 illustrate the blandishments that Microsoft is willing to extend to OEMs that ally with it to help it capture browser share. Microsoft's relations with Gateway and the IBM PC Company, by contrast, reveal the pressure that Microsoft is willing to apply to OEMs that show reluctance to cooperate on this front.

236. In February 1997, a Microsoft account representative told his counterpart at Gateway that Gateway's use of Navigator on its own corporate network was a serious issue at Microsoft. He added that Microsoft would not do any co-marketing and sales campaigns with Gateway if the firm appeared to be anything but pro-Microsoft. If Gateway would replace Navigator with Internet Explorer, Microsoft would compensate Gateway for its investment in Netscape's product. If Gateway refused, Microsoft might be compelled to audit Gateway's internal use of Microsoft products. Gateway was separately told by Microsoft representatives that its decision to ship Navigator with its PCs could affect its business relationship with Microsoft. Despite the pressure from Microsoft, Gateway refused to switch its internal use to Internet Explorer or to stop shipping Navigator with its PCs. Although Microsoft did not implement its more specific threats, Gateway has consistently paid higher prices for Windows than its competitors. Microsoft's actions not only corroborate the evidence of its interest in suppressing the usage of Navigator, they also demonstrate its ability to threaten recalcitrant customers without losing their business.

237. Similarly, in early 1997, Microsoft tried to convince the IBM PC Company to promote and distribute the upcoming release of its new browser, Internet Explorer 4.0. At a meeting with IBM executives in March 1997, Microsoft representatives threatened that, if IBM did not pre-load and promote Internet Explorer 4.0 to the exclusion of Navigator on its PCs, it would suffer "MDA repercussions."

One of the Microsoft representatives in attendance, Bengt Ackerlind, stated that in return for IBM shipping its systems without any software that competed with Microsoft, IBM would receive "soft dollars," marketing assistance, improved access to the source code of Windows 95 and Microsoft's BackOffice product, and the ability to self-certify for Microsoft's Windows Hardware Quality Lab provisions. In a follow-up meeting three weeks later, Microsoft representatives again insisted that IBM distribute and promote Internet Explorer exclusively and again offered soft dollars, marketing assistance, and MDA reductions in return. Later that day, in a smaller meeting that Microsoft referred to as "secret discussions," Ackerlind stated Microsoft's desire that IBM promote Internet Explorer 4.0 exclusively and warned that if IBM pre-installed Navigator on its PCs, "We have a problem."

238. The IBM PC Company refused to promote Internet Explorer 4.0 exclusively, and it has continued to pre-install Navigator on its PCs. The difference in the ways that Compaq and IBM responded to Microsoft's Internet-related overtures in 1996 and 1997 contributed to the stark contrast in the treatment the two firms have since received from Microsoft.

d. The Effect of Microsoft's Actions in the OEM Channel

239. Microsoft has largely succeeded in exiling Navigator from the crucial OEM distribution channel. Even though a few OEMs continue to offer Navigator on some of their PCs, Microsoft has caused the number of OEMs offering Navigator, and the number of PCs on which they offer it, to decline dramatically. Before 1996, Navigator enjoyed a substantial and growing presence on the desktop of new PCs. Over the next two years, however, Microsoft's actions forced the number of copies of Navigator distributed through the OEM channel down to an exiguous fraction of what it had been. By January 1998, Kempin could report to

his superiors at Microsoft that, of the sixty OEM sub-channels (15 major OEMs each offering corporate desktop, consumer/small business, notebook, and workstation PCs), Navigator was being shipped through only four. Furthermore, most of the PCs shipped with Navigator featured the product in a manner much less likely to lead to usage than if its icon appeared on the desktop. For example, Sony only featured Navigator in a folder rather than on the desktop, and Gateway only shipped Navigator on a separate CD-ROM rather than pre-installed on the hard drive. By the beginning of January 1999, Navigator was present on the desktop of only a tiny percentage of the PCs that OEMs were shipping.

240. To the extent Netscape is still able to distribute Navigator through the OEM channel, Microsoft has substantially increased the cost of that distribution. Although in January 1999 (in the midst of this trial), Compaq suddenly decided to resume the pre-installation of Navigator on its Presario PCs, Compaq's reversal came only after Netscape agreed to provide Compaq with approximately $700,000 worth of free advertising.

241. In sum, Microsoft successfully secured for Internet Explorer—and foreclosed to Navigator—one of the two distribution channels that leads most efficiently to the usage of browsing software. Even to the extent that Navigator retains some access to the OEM channel, Microsoft has relegated it to markedly less efficient forms of distribution than the form vouchsafed for Internet Explorer, namely, prominent placement on the Windows desktop. Microsoft achieved this feat by using a complementary set of tactics. First, it forced OEMs to take Internet Explorer with Windows and forbade them to remove or obscure it—restrictions which both ensured the prominent presence of Internet Explorer on users' PC systems and increased the costs attendant to pre-installing and promoting Navigator. Second, Microsoft imposed additional technical restrictions

to increase the cost of promoting Navigator even more. Third, Microsoft offered OEMs valuable consideration in exchange for commitments to promote Internet Explorer exclusively. Finally, Microsoft threatened to penalize individual OEMs that insisted on pre-installing and promoting Navigator. Although Microsoft's campaign to capture the OEM channel succeeded, it required a massive and multifarious investment by Microsoft; it also stifled innovation by OEMs that might have made Windows PC systems easier to use and more attractive to consumers. That Microsoft was willing to pay this price demonstrates that its decision-makers believed that maximizing Internet Explorer's usage share at Navigator's expense was worth almost any cost.

3. Excluding Navigator from the IAP Channel

242. By late 1995, Microsoft had identified bundling with the client software of IAPs as the other of the two most efficient channels for distributing browsing software. By that time, however, several of the most popular IAPs were shipping Navigator. Recognizing that it was starting from behind, Microsoft devised an aggressive strategy to capture the IAP channel from Netscape. In February 1996, Cameron Myhrvold, the Microsoft executive in charge of the firm's relations with ISPs, outlined the strategy in a memorandum to his colleagues and superiors within the company:

> It's essential we increase the share of our browser. Network operators [(IAPs, plus the telephone and cable companies providing Internet access services)] are important distributors and we will license at no cost the Internet Explorer for distribution with their Internet access business to maximize the distribution/adoption of IE as browser of choice. We will attempt exclusive arrangements, fight for preferred status, but

> settle for parity with NetScape. Even offering IE for free will not win us every sale. In the U.S. we will offer IE broadly to net[work]op[erator]s and IAPs including the many hundreds of smaller IAPs.

In the first step of this strategy, Microsoft enticed ISPs with small subscriber bases to distribute Internet Explorer and to make it their default browsing software by offering for free both a license to distribute Internet Explorer and a software kit that made it easy for ISPs with limited resources to adapt Internet Explorer for bundling with their services.

243. Those who planned and implemented Microsoft's IAP campaign believed that, if IAPs gave new subscribers a choice between Internet Explorer and Navigator, most of them would pick Navigator—both because Netscape's brand had become nearly synonymous with the Web in the public consciousness and because Navigator had developed a much better reputation for quality than Internet Explorer. To compensate for Navigator's advantage, Microsoft reinforced its free distribution of Internet Explorer licenses and the access kits with three tactics designed to induce IAPs with large subscriber bases not only to distribute and promote Internet Explorer, but also to constrain severely their distribution and promotion of Navigator and to convert those of their subscribers already using Navigator to Internet Explorer.

244. Microsoft's first tactic was to develop and include with Windows an Internet sign-up program that made it simple for users to download access software from, and subscribe to, any IAP appearing on a list assembled by Microsoft. In exchange for their inclusion on this list, the leading IAPs agreed, at Microsoft's insistence, to distribute and promote Internet Explorer, to refrain from promoting non-Microsoft Web browsing software, and to ensure that they distributed non-Microsoft browsing software to only a limited percentage of their subscribers. Although the

percentages varied by IAP, the most common figure was twenty-five percent.

245. In a similar tactic aimed at a more important IAP sub-channel, Microsoft created an "Online Services Folder" and placed an icon for that folder on the Windows desktop. In exchange for the pre-installation of their access software with Windows and for the inclusion of their icons in the Online Services Folder, the leading OLSs agreed, again at Microsoft's insistence, to distribute and promote Internet Explorer, to refrain from promoting non-Microsoft Web browsing software, and to distribute non-Microsoft browsing software to no more than fifteen percent of their subscribers.

246. Finally, Microsoft gave IAPs incentives to upgrade the millions of subscribers already using Navigator to proprietary access software that included Internet Explorer. To IAPs included in the Windows Internet sign-up list, Microsoft offered the incentive of reductions in the referral fees it charged for inclusion in the list. To OLSs in the Online Services Folder, Microsoft offered cash bounties.

247. In sum, Microsoft made substantial sacrifices, including the forfeiture of significant revenue opportunities, in order to induce IAPs to do four things: to distribute access software that came with Internet Explorer; to promote Internet Explorer; to upgrade existing subscribers to Internet Explorer; and to restrict their distribution and promotion of non-Microsoft browsing software. The restrictions on the freedom of IAPs to distribute and promote Navigator were far broader than they needed to be in order to achieve any economic efficiency. This is especially true given the fact that Microsoft never expected Internet Explorer to generate any revenue. Ultimately, the inducements that Microsoft offered IAPs at substantial cost to itself, together with the restrictive conditions it imposed on IAPs, did the four things they were designed to accomplish: They caused Internet Explorer's usage share to surge; they caused Navigator's usage share to plummet; they raised Netscape's costs; and

they sealed off a major portion of the IAP channel from the prospect of recapture by Navigator. As an ancillary effect, Microsoft's campaign to seize the IAP channel significantly hampered the ability of consumers to make their choice of Web browser products based on the features of those products.

a. The Internet Explorer Access Kit Agreements

248. In September 1996, Microsoft announced the availability of the "Internet Explorer Access Kit," or "IEAK." By simply accessing the correct page on Microsoft's Web site and clicking on a box to indicate agreement with the license terms, any IAP could download the IEAK, which included a copy of Internet Explorer. With their technical knowledge, sophisticated equipment, and high-bandwidth connections, IAPs found it very convenient to download Internet Explorer and the IEAK from Microsoft's Web site.

249. Using the IEAK, an IAP could create a distinctive identity for its service in as little as a few hours by customizing the title bar, icon, start and search pages, and "favorites" in Internet Explorer. The IEAK also made the installation process easy for IAPs. With the IEAK, IAPs could avoid piecemeal installation of various programs and instead create an automated, comprehensive installation package in which all settings and options were pre-configured. In addition to ease of customization and installation, the IEAK enabled each IAP to preset the default home page so that customers would be taken to the IAP's Web site whenever they logged onto the Internet. This was important to IAPs because setting the user's home page to the IAP's Web site gave the IAPs advertising and promotional opportunities. Netscape, by contrast, refused to allow its IAP licensees to move Navigator's home page from Netscape's NetCenter portal site.

250. Many IAPs would have paid for the right to distribute Internet Explorer. Indeed, Netscape was charging IAPs between fifteen and twenty dollars per copy of Navigator they distributed. Because of the features and convenience it offered, the IEAK significantly increased the price that IAPs would have been willing to pay. Nevertheless, Microsoft licensed the IEAK, including Internet Explorer, to IAPs at no charge. At the time Microsoft released the IEAK, Netscape did not offer IAPs an analogous tool. Although Netscape eventually followed Microsoft's lead by introducing a tool kit similar to the IEAK known as Mission Control, that kit was not made available to IAPs until June 1997—a full nine months after the release of the IEAK. Whereas IAPs could obtain the IEAK for free, Netscape initially charged $1,995 for each copy of Mission Control.

251. Approximately 2,500 IAPs executed an electronic copy of a license agreement for the IEAK. Included in that number were the eighty IAPs that together accounted for ninety-five percent of all Internet access subscribers in the United States. The IAPs that executed an IEAK license agreement agreed to make Internet Explorer their "preferred" browsing software. The term "preferred" was not defined in the license, and Microsoft did not investigate the extent to which Internet Explorer was in fact enjoying "preferred" status in the client software of its IEAK licensees. In fact, other than to provide information and respond to technical questions, Microsoft made no effort to maintain regular direct contact with the vast majority of the IAPs that had executed licenses.

252. Whether or not IEAK licensees actually gave Internet Explorer preferred status, Microsoft's decision to license Internet Explorer and the IEAK to IAPs at no charge beguiled many small ISPs that otherwise would not have done so into distributing Internet Explorer to their subscribers. By giving up the opportunity to charge for

Internet Explorer, and also by developing the IEAK at substantial cost and offering it at no charge, Microsoft thus increased the flow of Internet Explorer through the crucial IAP channel.

b. The Referral Server Agreements

253. In the late summer of 1996, at around the time that it announced the availability of the IEAK, Microsoft also introduced the Internet Connection Wizard ("ICW") as a feature in Windows 95 OSR 2. If a user clicked on the ICW icon appearing on the Windows 95 desktop, the program would automatically dial into a computer maintained by Microsoft called the Windows Referral Server. The Referral Server would then transmit to the user's computer a list of IAPs that provided connections to the Internet in the user's geographic locale. Included in this list would be information about each IAP's service, including its prices. If the user then indicated a desire to sign up for one of the listed IAPs by clicking on the appropriate entry, the user would be connected to an IAP-maintained server that would automatically configure the user's PC to work properly with the IAP service.

254. For several reasons, IAPs viewed inclusion in the Windows 95 Referral Server as a valuable form of promotion. First, the ICW icon appeared prominently on the desktop of every PC running Windows 95 (from OSR 2 onwards), which, by the middle of 1996, accounted for the vast majority of all new PCs being shipped. Because Microsoft prohibited OEMs from removing any of the icons that it placed on the Windows desktop, IAPs knew that the ICW would confront all users of Windows 95 PCs the first time they turned on their systems. Second, inclusion in the Referral Server was a highly focused form of promotion, because the IAP list provided by the Referral Server presented itself to users who had already indicated some interest in signing up for Internet access. Third, the easy-to-

use features of the ICW heightened the probability that a user who started using the program would complete the process of subscribing to an IAP. Finally, inclusion in the Referral Server was a relatively inexpensive means of distribution because, unlike "carpet bombing" with CD-ROMs, it did not require the production and dissemination of anything tangible.

255. Despite the value that IAPs attached to placement in the Windows 95 Referral Server, Microsoft elected to charge those that it granted placement a low bounty price that merely went to pay down the cost of maintaining the necessary server computers and leasing the network they ran on. Although it could have been exchanged for large bounties from IAPs, Microsoft decided to exchange placement in the Referral Server, along with other valuable consideration, for the agreement of the selected IAPs to promote and distribute Internet Explorer preferentially over Navigator and to convert existing subscribers from Navigator to Internet Explorer.

256. Between July 1996 and September 1997, Microsoft entered into Referral Server agreements with fourteen IAPs. These were AOL, AT&T WorldNet, Brigadoon, Concentric, Digex, EarthLink, GTE, IDT, MCI, MindSpring, Netcom, Prodigy, Sprint, and Spry. Three of these companies did not take the technical steps necessary to appear in the Referral Server even though they had signed agreements with Microsoft. Brigadoon failed to take those steps because it filed for bankruptcy. For its part, Digex left the ISP business to focus exclusively on Web hosting. GTE, on the other hand, decided to enter promotion agreements directly with OEMs rather than abide by the conditions Microsoft attached to inclusion in the Referral Server. Although AOL eventually entered a listing into the Referral Server, it waited until November 1998, after the release of Windows 98. The remaining IAPs in the Windows 95

Referral Server represented ten of the top fifteen Internet access providers in the North America.

257. Pursuant to the terms of the agreements it signed with these ten IAPs, Microsoft provided each with a listing in the Windows 95 Referral Server and mentioned them in press releases and marketing activities relating to the ICW. Microsoft also licensed Internet Explorer to them at no charge, and assisted them in customizing Internet Explorer for use with their services. In exchange, the listed IAPs agreed to offer Internet Explorer as the "standard," "default," or "preferred" browsing software with their services. For example, Microsoft's agreement with EarthLink required it to "[o]ffer the Microsoft Internet Explorer as the standard web browser for [EarthLink's] ISP Service."

258. The agreements also imposed several restrictions on the ability of the IAPs in the Referral Server to promote and distribute non-Microsoft browsing software. First, the agreements required the IAPs to limit their promotion of browser products other than Internet Explorer. For example, the agreements prohibited the IAPs from providing any links or other promotions for Netscape on their services' home pages. In fact, an IAP listed in the Referral Server was not permitted, either in its Referral Server entry or elsewhere, to express or imply to its subscribers that they could use a browser other than Internet Explorer with the IAP's service. Second, the agreements prohibited the ten IAPs from providing non-Microsoft browsing software to their customers unless a subscriber specifically requested it. Third, the agreements gave Microsoft the right to remove from the Referral Server any IAP that, in two consecutive calendar quarters, allowed non-Microsoft browsing software to climb above a specified percentage of all browsing software distributed by that IAP. Thus, even if the IAP ensured that all users subscribing to its service through the Internet Connection Wizard received only Internet Explorer with their subscriptions, Microsoft could nevertheless remove the

ISP from the Referral Server if copies of Navigator made up more than the specified percentage of the browsing software that the IAP distributed through all sub-channels. Twenty-five percent was the figure specified in most of the agreements. For Netcom and Sprint, the figure was fifty percent, while for IDT it was fifteen.

259. In addition to conditioning placement in the Referral Server on an IAP's undertaking to limit its promotion and distribution of non-Microsoft browsing software, Microsoft through its Referral Server agreements exchanged valuable consideration for the commitment of the ten IAPs to convert existing subscribers from Navigator to Internet Explorer. Microsoft also compensated them for employing Internet Explorer-specific technologies whose dissemination would encourage the developers of network-centric applications to focus on APIs controlled by Microsoft, as opposed to Netscape or Sun. For example, in exchange for Netcom's commitment to offer deals to its customers encouraging them to upgrade their software to the newest version that bundled Internet Explorer, Microsoft subtracted nine dollars from the referral fee. Microsoft also deposited one dollar into a co-marketing fund for each Netcom subscriber who actually upgraded to client software that bundled Internet Explorer.

260. Where the agreement with Microsoft required the IAP to abandon a distribution agreement already entered with Netscape, Microsoft compensated the IAP with additional consideration. For instance, in response to a representation from MCI that it had already committed to pay Netscape between five and ten million dollars for Web browsing software, Microsoft agreed to grant MCI a credit of five dollars toward a co-marketing fund (not to exceed five million dollars) for each copy of Internet Explorer that MCI distributed to an MCI Internet access customer who had not already received a copy. Finally, Microsoft offered yet further reductions in referral fees to the IAPs using

Microsoft-controlled technologies likely to stimulate developers to focus their attention on Windows-specific software interfaces rather than the cross-platform ones provided by Netscape and Sun. For example, Microsoft offered to reduce EarthLink's per-copy referral fee by ten dollars in exchange for EarthLink's use of at least two ActiveX controls in the design of its home page and the use of Microsoft FrontPage server extensions on its Web hosting servers.

261. Microsoft could have covered the cost of developing and maintaining the ICW and the Windows Referral Server, and even made a profit, by charging higher referral fees than it did to the favored IAPs. Instead, Microsoft bartered away so much of the referral fees it otherwise could have charged that the costs of running the Windows Referral Server have thus far exceeded the payments Microsoft has received from the favored IAPs. Microsoft readily made this sacrifice in order to induce the important IAPs to take actions that aided Microsoft's effort to exclude Navigator from the IAP channel.

262. Microsoft's motivation for the limits it placed on the distribution of non-Microsoft browsing software by IAPs in the Windows 95 Referral Server could not have been simply a desire to ensure that IAPs did not promote competing browsing software to subscribers acquired with Microsoft's help. The agreements gave Microsoft the right to dismiss an IAP that either told its subscribers they could choose Navigator or distributed too many copies of non-Microsoft browser products. This was true even if the IAP never mentioned Navigator in its Referral Server entry and distributed nothing but Internet Explorer to the new subscribers it garnered from the ICW. In light of that fact, the Windows 95 Referral Server agreements emerge as something very different from typical cross-marketing arrangements. Furthermore, while facilitating for consumers the process of connecting to the Internet may have been one

motivation for developing the Internet Connection Wizard, that motivation cannot explain the exclusionary terms in the Referral Server agreements. After all, contractually limiting the distribution of non-Microsoft browsing software by IAPs did nothing to help consumers gain easy access to the Internet. The real motivation behind the exclusionary terms in the Referral Server agreements was Microsoft's conviction that even if IAPs were compelled to promote and distribute Internet Explorer, the majority of their subscribers would nevertheless elect to use Navigator if the IAPs made it readily available to them. Microsoft therefore paid a high price to induce the most popular IAPs to encourage their customers to use Internet Explorer and discourage them from using Navigator.

263. Absent the conditions Microsoft placed on inclusion in the Referral Server, the IAPs would have had no reason to limit the percentage of subscribers that used one particular browser or another. As Cameron Myhrvold explained to colleagues within Microsoft in April 1997, "ISPs are agnostic on the browser. It is against their nature to favor a browser or even a platform. This has been damn hard for us to influence." In fact, Myhrvold told the same colleagues that he "had a hard time guiding the ISPs to IE loyalty even when I make them sign explicit terms and conditions in a legal contract."

264. Microsoft monitored the extent of compliance of IAPs in the Referral Server with the shipment restrictions contained in their agreements. It did this by periodically asking each of the ten IAPs to send Microsoft estimates of the number of copies of Internet Explorer—and non-Microsoft browsing software—they were shipping. When, from time to time, various IAPs in the Windows 95 Referral Server (specifically Netcom, Concentric, and EarthLink) fell below the shipment quotas specified in their agreements with Microsoft, executives at Microsoft reacted by contacting the derelict companies and urging them to meet their obligations.

Concentric and Earthlink eventually (by May 1998, if not sooner) reduced their Navigator shipments enough to bring them below the required percentage. Microsoft never formally removed an IAP from the Referral Server. For a time after the release of Internet Explorer 4.0, however, no entry for Netcom appeared in the new version of Referral Server. This was at least in part due to Netcom's failure to ensure that Internet Explorer accounted for fifty percent of the browsing software it shipped.

265. In addition to failing, for a time, to meet the required shipment quotas, Concentric and EarthLink occasionally promoted Navigator in ways that were arguably prohibited by the Referral Server agreements. Despite their delinquency, Microsoft never removed Concentric and EarthLink from the Referral Server. Of much less concern to Microsoft than the shipment and promotion of Navigator by IAPs having signed Referral Server agreements was the fact that Concentric and EarthLink, along with Netcom and three of the other IAPs in the Windows 95 Referral Server, also appeared in Netscape's referral server. This did not violate either the letter or the spirit of their agreements with Microsoft, for while the agreements prohibited the IAPs in the Windows 95 Referral Server from promoting Navigator, they did not purport to hinder Netscape in promoting those IAPs. At any rate, Microsoft did not have reason to be concerned with the appearance of its IAP partners in Netscape's referral server, whose main exposure was to existing Navigator users interested in switching their IAPs. A listing in Netscape's referral server did not help Netscape get its software on users' systems, and pursuant to their agreements with Microsoft, the six ISPs in both Microsoft's and Netscape's referral servers were actually placing Navigator on far fewer users' systems than they would have in the absence of their agreements with Microsoft.

266. In reaction to Microsoft's Referral Server agreements, Netscape entered into agreements of its own

with five of the Regional Bell Operating Companies (RBOCs). Under the Netscape agreements, the RBOCs agreed to make Navigator their default Web browsing software in all cases, except those in which subscribers affirmatively requested other browsing software. In exchange, Netscape agreed to list the RBOCs first among the IAPs included in Netscape's referral server. In contrast to Microsoft's agreements, Netscape's agreements with the RBOCs imposed no restrictions on their ability to distribute other browsing software, such as Internet Explorer, whether in response to customer requests or otherwise. Furthermore, Netscape's contracts with the RBOCs required them to set Navigator as the default only so long as AT&T and MCI were both restricted by their agreements with Microsoft from providing Navigator to their customers on par with Internet Explorer. In any event, the RBOCs currently deliver Internet access to less than five percent of the Internet access subscribers in North America.

267. Microsoft's Windows 95 Referral Server agreements were of relatively short duration. For example, Microsoft's agreement with EarthLink provided that it would expire two years from its signing in August 1996 unless either party elected to terminate it sooner, and both Microsoft and EarthLink were free to terminate the agreement for any reason on thirty days' written notice. The other Referral Server agreements were similarly short in term.

268. In April 1998, coincident with rising public criticism, the impending appearance of Bill Gates before a Congressional panel on competition in the computer industry, and the imminent filing of these lawsuits, Microsoft unilaterally waived the most restrictive provisions in the Windows 95 Referral Server agreements. Specifically, Microsoft waived the provisions that restricted the IAPs' ability to distribute non-Microsoft Web browsing software. With respect to promotion, the revised agreements merely

required the IAPs to promote Internet Explorer at least as prominently as they promoted non-Microsoft browsers. Notably, however, the agreements still required the IAPs to make Internet Explorer their default browser.

269. By the end of September 1998, all of the Windows 95 Referral Server agreements had expired by their own terms. Microsoft's Windows 98 Referral Server agreements do not contain any provisions requiring that Internet Explorer make up any particular percentage of the IAPs' shipments. Furthermore, the Windows 98 Referral Server agreements offer no discounts on the referral fees predicated on the IAPs' adoption of any particular Microsoft technology or licensing any Microsoft product. With regard to promotion, the agreements require only that the IAPs promote Internet Explorer no less favorably than non-Microsoft Web browsing software. Still, for those IAPs concerned with the costs associated with supporting two browser products, this parity requirement is enough to compel them not to not make Navigator readily available to their subscribers. The new agreements have a one-year term and are terminable at will by the IAP on ninety days' notice.

270. IAPs no longer value placement in the Windows Referral Server as much as they did in 1996. For one reason, the ICW has apparently not been responsible for as many new IAP subscriptions as either Microsoft or the IAPs anticipated. In fact, from the third quarter of 1996 through the third quarter of 1998, only 2.1% of new users of the Internet became IAP subscribers through the Windows Referral Server. Partially on account of this realization, Microsoft began in the spring of 1998 to surrender significant control over the Internet sign-up process to OEMs. As described above, Microsoft gave the top fifty OEMs in the world the right to select both the IAPs (up to five) that appear in the Windows 98 Referral Server on the PC systems they sell and to determine the order in which those IAPs appear. Microsoft also permits the fifty OEMs to

keep any bounties that the IAPs pay them for inclusion in the Referral Server. The OEMs simply pay Microsoft a nominal fee (a flat fee of approximately $10,000 plus thirty cents per subscriber) to defray the costs of operating the Referral Server program. Furthermore (as is also discussed above), Microsoft has allowed seven of the highest-volume OEMs to supplant the ICW altogether.

271. By both lifting restrictions in its agreements and ceding control over the IAP sign-up process to OEMs, in the spring of 1998, Microsoft relaxed the strictures that it had imposed in the fall of 1996 on the distribution and promotion of Web browsing software by the most popular IAPs. In the year-and-a-half that they were in full force, however, the restrictive terms in the Referral Server agreements induced the major IAPs to customize their client software for Internet Explorer, gear their promotional and marketing activities to Microsoft's technologies, and convert substantial portions of their installed bases from Navigator to Internet Explorer. They may have welcomed more flexibility to distribute Navigator to those subscribers that expressed demand for it, but they had no incentive to launch an expensive campaign to reverse the tide that Microsoft's restrictions had already generated. Consequently, few ISPs have responded to Microsoft's contractual dispensations by increasing significantly their distribution and promotion of Navigator. Furthermore, one of the reasons Microsoft felt comfortable relaxing the controls on IAPs in the spring of 1998 was that it had achieved—and planned to maintain—control over the distribution and promotion of Web browsing software by AOL and the other major OLSs, whose combined subscriber base comprised most of North America's Internet users.

c. The Online Services Folder Agreements

272. In late 1995 and early 1996, senior executives at Microsoft recognized that AOL accounted for a substantial portion of all existing Internet access subscriptions and that it

attracted a very large percentage of new IAP subscribers. Indeed, AOL was and is the largest and most important IAP. The Microsoft executives thus realized that if they could convince AOL to distribute Internet Explorer with its client software instead of Navigator, Microsoft would—in a single coup—capture a large part of the IAP channel for Internet Explorer. In the early spring of 1996, therefore, Microsoft exchanged favorable placement on the Windows desktop, as well as other valuable consideration, for AOL's commitment to distribute and promote Internet Explorer to the near exclusion of Navigator. AOL's acceptance of this arrangement has caused an enormous surge in Internet Explorer's usage share and a concomitant decline in Navigator's share. To supplement the effects of the AOL deal, Microsoft entered similar agreements with other OLSs. The importance of these arrangements to Microsoft is evident in the fact that, in contrast to the restrictive terms in the Windows Referral Server agreements, Microsoft has never waived the terms that require the OLSs to distribute and promote Internet Explorer to the near exclusion of Navigator.

i. AOL

273. Prior to 1995, OLS subscribers used proprietary access software to view only their OLS's specialized content. Beginning in 1994, however, the public became increasingly interested in accessing information on the Web. So to keep from losing subscribers and to attract new ones, OLSs upgraded their services to provide access to the Web. In November 1994, for example, AOL purchased BookLink and incorporated its Web browsing software into AOL's proprietary access software to enable AOL's subscribers to access and view Web content.

274. While public awareness of the Web was taking hold, companies like Netscape and Microsoft were hard at work developing Web browsing software. By the fall of 1995, a number of OLSs, including AOL, had decided not to

devote the considerable resources that would have been required to keep up with this rapid pace of innovation. They chose instead to license state-of-the-art Web browsing technology from a separate supplier. Microsoft saw AOL, with its subscriber base then approaching five million, as a potential breakthrough opportunity—a way for Microsoft quickly to obtain credibility in Web browsing technology as well as usage share for the current version of its browsing software, Internet Explorer 3.0.

275. In November 1995, David Cole of AOL advised Pete Higgins of Microsoft that AOL was looking for Web browsing software to license and incorporate into future versions of its proprietary access software. Bill Gates and AOL's Chairman, Steve Case, subsequently spoke several times on the telephone. In those conversations, Gates urged that AOL representatives meet with Microsoft technical personnel in order to get a better sense of the quality and features of Internet Explorer 3.0. For his part, Case told Gates that he wanted Microsoft to include AOL's client software with Windows such that AOL received the same desktop promotion that MSN enjoyed. Gates insisted that such favorable treatment of AOL within Windows was out of the question.

276. Lower down in Microsoft's chain of command, executives took issue with Gates' reluctance to grant AOL favorable placement in Windows. In October 1995, before Gates and Case began talking, a group of Microsoft executives prepared for Gates a memorandum on the company's Internet Explorer efforts entitled, "How to Get to 30% Share in 12 Months." The executives wrote that

> we need to remove barriers to browser adoption by Online Services and Internet Access Providers. Today MSN is an access service . . . , an online service . . . , and an Internet site . . . ; in other words, it competes with everyone. By bundling MSN in the Windows box, we are

threatening ISV's in each of these areas, who in turn have no incentive to promote our Internet Browser.

277. One of the proposals the executives put forward was that Microsoft "Open Up the Windows Box." In other words, the executives believed that, in exchange for favorable treatment of Internet Explorer, Microsoft should include the client software of IAPs in Windows and give those services prominent placement on the desktop, even if such placement drew attention away from MSN. Over the months that followed, senior Microsoft executives came to the conclusion that opening up the Windows box to MSN's competitors was a necessary price to pay for increasing Internet Explorer's share of browser usage.

278. Case ultimately agreed to visit Microsoft's Redmond campus in January 1996. In preparation for that meeting, Microsoft purchased PC systems from five different OEMs (Compaq, Hewlett-Packard, IBM, Packard Bell, and NEC) at retail outlet stores. When they turned these systems on, employees at Microsoft discovered that the OEMs were already shipping AOL's software pre-installed on their PCs and giving the AOL service more prominent placement than MSN on the Windows desktop. From the fact that AOL was already enjoying broad distribution and promotion on the Windows desktop through agreements with OEMs, several senior Microsoft executives, in particular Paul Maritz and Brad Chase, concluded that Microsoft would not be giving up all that much if it traded placement on the Windows desktop for AOL's commitment to promote and distribute Internet Explorer. At least initially, Gates took a different lesson from the experiment with the five PC systems. He seems to have felt that Microsoft should react not by 'opening up the Windows box,' but rather by clamping down on the ability of OEMs to configure the Windows desktop. Indeed, the discovery that OEMs were promoting AOL on the Windows desktop was one of the things that led him to

complain to Joachim Kempin on January 6, 1996 about OEMs that were bundling non-Microsoft Internet services and software and displaying it on their PCs "in a FAR more prominent way than MSN or our Internet browser."

279. Case's insistence that Microsoft promote AOL on the Windows desktop stemmed partly from factors other than the additional subscriptions expected to come from the OLS folder. AOL already enjoyed distribution agreements with major OEMs that placed an AOL icon on the desktop of millions of new PC systems. But given that its OEM agreements tended to be short-term and somewhat tenuous, and considering how sensitive the OEMs were to Microsoft's will, AOL executives realized that AOL's position on the Windows desktop would be more secure if it met with some degree of contractual acquiescence from Microsoft. After all, whereas Microsoft retaliated in subtle and not-so-subtle ways against OEMs, such as IBM, that pre-installed software on their PCs that Microsoft found minatory, it pronounced more extreme sanctions against OEMs, such as Compaq, that had the temerity to remove icons and program entries from the Windows desktop that Microsoft had placed there. Case had reason to see value, then, in shifting AOL from being a source of software at whose promotion Microsoft took umbrage to the dispenser of software whose placement on the Windows desktop Microsoft guaranteed. Moreover, obtaining Microsoft's commitment to include the AOL client software and prominent promotion for AOL in every copy of Windows would place AOL on all Windows 95 PC systems, including those sold by the multitude of OEMs whose shipment volumes were too low to warrant the negotiation of separate distribution deals. Furthermore, placement on the desktop in some fashion would improve AOL's negotiating position when it asked individual large OEMs to place an AOL icon directly on the desktop of their PC systems. Whatever the reason, and irrespective of the considerable value that Microsoft offered AOL apart from desktop placement, Case made clear to Gates his sincere conviction

that AOL would not recruit its subscribers to Internet Explorer unless Microsoft included AOL's client software in Windows and promoted AOL in some form on the Windows desktop.

280. Four days before Case was due to arrive at Microsoft's campus, Gates sent an E-mail outlining Microsoft's goals in negotiating a deal with AOL to the responsible Microsoft executives. He wrote:

> What we want from AOL is that for a period of time—say 2 years—the browser that they give out to their customers and the one they mention and put on their pages and the one they exploit is ours and not Netscape[']s. We need for them to make our browser available as the browser to existing and new customers. We have to be sure that we don't allow them to promote Netscape as well. We want all the hits that come off of AOL to register on servers as our browser so people can start seeing us as having measurable browser share.

Gates understood that if AOL gave assurance that its subscribers used Internet Explorer when browsing the Web, the measure of browser usage share data to which application developers paid most attention—*i.e.*, server "hit" data—would show a significant rise in Internet Explorer's usage share. Gates also realized that such a commitment by AOL was worth seeking even if it lasted for only a couple of years.

281. On January 18, 1996, Case arrived at Microsoft's campus with three other AOL executives. During the first meeting, Microsoft described the componentized architecture of Internet Explorer 3.0 that would allow AOL to embed the browsing software into AOL's access software. The AOL executives viewed componentization as a highly attractive feature, because AOL wanted its subscribers to feel they were using an AOL service whether they were viewing

proprietary AOL content or browsing content on the Web. In fact, Case and the other AOL representatives told their Microsoft hosts that AOL wanted total control over the "browser frame" (the windows in which Web content is displayed) to make it distinctive to AOL. In other words, AOL wanted no menus, dialog boxes, or other visible signs that would alert AOL users to the fact that they were using Web browsing software supplied by a company other than AOL.

282. At the end of the meeting, Case expressly acknowledged the attractiveness of Microsoft's componentized approach. Notably, Netscape had not yet developed a componentized version of Navigator. Netscape had assured AOL that it would do so, and AOL believed that Netscape was capable of eventually making good on its pledge, but the fact remained that Microsoft had already completed a componentized version of Internet Explorer. Case was impressed enough with Internet Explorer 3.0 that when he returned to AOL he told a number of fellow executives that, when it came to AOL's technical considerations, Microsoft perhaps enjoyed an edge over Netscape. Still, the AOL executives saw Navigator as enjoying better brand recognition and demonstrated success in the marketplace.

283. Later in the day on January 18, Case and his team also met with Gates, Chase, and Chase's direct superior, Brad Silverberg, to discuss the business aspects of a potential AOL-Microsoft alliance. At one point during the meeting, Case again told Gates that AOL needed inclusion of its client software in Windows and prominent placement on the Windows desktop if there was to be a closer relationship between the two companies. Gates expressed frustration that Case continued to insist on getting an AOL icon on the Windows desktop in addition to the technology, engineering assistance, and technical support Microsoft was offering AOL. Despite the obvious importance that Case attached to

desktop placement, Gates said he would not agree to that condition.

284. A week after the January 18 meeting, Chase and Silverberg met with Gates. They reiterated that, whether Gates liked it or not, an AOL icon already appeared on the desktop of the major OEMs' PCs. Given that fait accompli, they argued, Microsoft would gain much more than it would lose by agreeing to place AOL on the Windows desktop in exchange for AOL's commitment to promote and distribute Internet Explorer. This time, Gates agreed to give AOL some sort of promotion in Windows. He continued to insist, however, that Microsoft not place an AOL icon directly on the Windows desktop. Rather, Gates agreed to include AOL, along with other OLSs, in a generic "Online Services Folder," an icon for which would reside on the desktop. Since MSN enjoyed a branded icon directly on the desktop, including AOL in the OLS folder would maintain its inferior status to Microsoft's service.

285. Still, Gates viewed the concession as a significant one; he understood that it meant undermining MSN's success in the pursuit of browser share. As he told an interviewer in the spring of 1996:

> We have had three options for how to use the "Windows Box": First, we can use it for the browser battle, recognizing that our core assets are at risk. Second, we could monetize the box, and sell the real estate to the highest bidder. Or third, we could use the box to sell and promote internally content assets. I recognize that, by choosing to do the first, we have leveled the playing field and reduced our opportunities for competitive advantage with MSN.

286. In light of AOL's success in having gained access to the Windows desktop through the expedient of OEM pre-installation without Microsoft's acquiescence, Gates' abiding

reluctance to grant AOL access through Microsoft's front door may have stemmed from a preoccupation with the message such a move would send—both to other firms in the computer industry and to consumers deciding which Internet service to use. Although Gates viewed it as a significant concession, he acquiesced in granting AOL a place in Windows because he believed that Microsoft could not pass up the opportunity AOL presented to drive Internet Explorer's usage share dramatically upward and to exclude Navigator from a substantial part of the IAP distribution channel.

287. The negotiations between Microsoft and AOL proceeded throughout February and early March 1996. On March 11, 1996, AOL announced that it had selected Navigator as the primary Web browsing software for GNN, which was AOL's basic ISP service at the time and had a subscriber base only two to three percent the size of the subscriber base of AOL's flagship online service. The GNN arrangement was thus eclipsed the following day when AOL announced that it had chosen Internet Explorer as the primary Web browsing software for its flagship service.

288. Under the March 12 agreement, Microsoft gave AOL access to, and the right to modify, Internet Explorer source code in order to customize it for use with AOL's proprietary access software. This concession went far beyond the freedom that the IEAK granted IAPs to place their own branding on Internet Explorer. Microsoft also agreed to provide AOL with significant engineering assistance and technical support to enable AOL to integrate Internet Explorer into AOL's proprietary access software. Further, Microsoft agreed to provide AOL with certain specific features of Internet Explorer 3.0 by precise target dates and to ensure that future versions of its Web browsing software would possess the latest available Internet-related technology features, capabilities, and standards. Finally, Microsoft granted AOL free world-wide distribution rights to

Internet Explorer and agreed to distribute AOL's proprietary access software in Windows and to place an AOL icon in the OLS folder on the Windows desktop.

289. In return for Microsoft's commitments, AOL agreed to base the proprietary access software of its flagship online service for Windows and the Mac OS on Internet Explorer 3.0 and to update that software as newer versions of Internet Explorer were released. Another provision in the agreement provided that "AOL and AOL Affiliates will, with respect to Third Party Browsers, exclusively promote, market and distribute, and have promoted, marketed and distributed, Internet Explorer on or for use by subscribers to the AOL Flagship Service." Specifically, AOL agreed to ensure that in successive six-month periods, neither the number of copies of non-Microsoft Web browsing software it shipped (through any sub-channel, including GNN), nor the number of new subscribers accessing AOL (including GNN) with non-Microsoft Web browsing software, would exceed fifteen percent of the total number of copies of proprietary access software that AOL distributed through any channel (i.e., through the Windows desktop or otherwise). AOL retained the right to distribute non-Microsoft Web browsing software to subscribers who affirmatively requested it, as long as doing so did not raise the relevant shipment quotients above fifteen percent. AOL also retained the right to provide a link within its service through which its subscribers could reach a Web site from which they could download a version of Navigator customized for the AOL service. At the same time, however, the agreement prohibited AOL from expressing or implying to subscribers or prospective subscribers that they could use Navigator with AOL. Nor did it allow AOL to include, on its default page or anywhere else, instructions telling subscribers how to reach the Navigator download site. In any event, as the Court has found above, downloading large programs over the Internet involves considerable time, and frequently some frustration, for the average user with average hardware and an analog

connection. The prospects were slim that many AOL users (who tend to be novice users with average equipment) would expend the effort to download Navigator when they already had browsing software that worked well with the AOL service. Finally, while the agreement permitted AOL (subject again to the fifteen-percent shipment quotas) to distribute non-Microsoft Web browsing software when requested by third-party providers, distributors, and corporate accounts, it obligated AOL to use all reasonable efforts to cause the third party to distribute that software on its own and to minimize the use of AOL's brand name with the distribution.

290. The Microsoft executives responsible for closing the deal with AOL recognized that AOL had agreed to distribute and promote Internet Explorer to the virtual exclusion of Navigator. Two days after Microsoft signed the agreement with AOL, Chase sent to Microsoft's executive staff a memorandum answering questions he thought the executives might have about the agreement. One such question was, "I find it hard to believe that AOL is using Internet Explorer as its browser. Are there exceptions?" Chase responded:

> Yes the[re] are some but they are pretty remote. An AOL customer could choose to use Navigator and it will be available to be downloaded from the AOL site, though not in a prominent way. There are some circumstances with 3rd party distribution deals where AOL has some limited flexibility. On its GNN service, AOL can do what it wants. But for all intents and purposes it is true, AOL will be moving its 5M customers to a new client integrated with Internet Explorer 3 starting this summer/fall.

291. As with the restrictive provisions in the Referral Server agreements, the provisions in the March 1996 agreement constraining AOL's distribution and promotion of Navigator had no purpose other than maximizing Internet

Explorer's usage share at Navigator's expense. Considering that the restrictions applied to AOL's proprietary access software regardless of the sub-channel through which it was distributed, and that Microsoft collected no revenue from Internet Explorer, the restrictions accomplished no efficiency. They affected consumers only by encumbering their ability to choose between competing browsing technologies. In order to gain AOL's acceptance of these restrictions, Microsoft accorded AOL free desktop placement that undermined its own MSN, in which Microsoft had invested hundreds of millions of dollars. Significantly, Microsoft did not waive any of the terms of its agreement with AOL (nor of its agreements with other OLSs) when it waived some of the restrictive provisions in its Referral Server agreements in April 1998. The reason was Microsoft's recognition that holding OLSs, particularly AOL, to exclusive distribution and promotion terms was more important to maximizing Internet Explorer's usage share than holding ISPs to similar terms.

292. Microsoft closely monitored AOL's compliance with the restrictive provisions in the March 1996 agreement. Microsoft employees periodically inspected AOL's service for any sign of promotions for Netscape. The scrutiny was close enough to prompt an AOL executive to write Microsoft's Chase: "We are not selling NS advertising around its browser or otherwise—let's move on. . . . [I]t is not time to be paranoid . . . ."

293. Ever since the negotiations with Microsoft intensified in early 1996, it had been AOL's intention to select one firm's Web browsing software and then to work closely with that firm to incorporate its browsing technology seamlessly into the AOL flagship client software. Regardless of which software it chose as its primary offering, though, AOL still wanted the ability to satisfy consumer demand for competing Web browsing software. AOL did not want users who preferred a certain brand of Web browsing software to

have to go to a competing OLS in order to obtain it. Therefore, even once it selected Internet Explorer as the software that it would integrate seamlessly into its client, AOL would have preferred to make an AOL-configured version of Navigator readily available to subscribers and potential subscribers.

294. Despite its preference, however, AOL did not make Navigator readily available to subscribers after the agreement with Microsoft took effect. To the contrary, AOL made it relatively difficult for new subscribers to obtain a version of Navigator that would work with its client software, and it pressured existing subscribers who used Navigator to abandon it in favor of client software that included Internet Explorer. In essence, AOL contravened its natural inclination to respond to consumer demand in order to obtain the free technology, close technical support, and desktop placement offered by Microsoft.

295. On October 28, 1996, Microsoft and AOL entered into an additional agreement called the Promotional Services Agreement, whereby AOL agreed to promote its new proprietary access software that included Internet Explorer to existing AOL subscribers, and Microsoft agreed to pay AOL for such promotion based on results. Specifically, Microsoft agreed to pay AOL $500,000, plus twenty-five cents (up to one million dollars) for each subscriber who upgraded from older versions of AOL's proprietary access software to the version that included Internet Explorer, plus $600,000 if AOL succeeded in upgrading 5.25 million subscribers by April 1997. In addition, AOL's Referral Server agreement with Microsoft provided that AOL would receive a two-dollar credit on referral fees for each new subscriber who used Internet Explorer. So while the March 12, 1996 agreement ensured that nearly all new AOL subscribers would use Internet Explorer, the Promotional Services and Referral Server agreements enlisted AOL in the effort to convert the OLS's

millions of existing subscribers to Internet Explorer. In fulfillment of these agreements, AOL began to prompt its subscribers to download the latest version of its client access software, complete with Internet Explorer, every time they logged off the service.

296. It is not surprising, given the terms of the 1996 agreements between Microsoft and AOL, that the percentage of AOL subscribers using a version of the client software that included Internet Explorer climbed steeply throughout 1997. By January 1998, Cameron Myhrvold was able to report to Gates and the rest of Microsoft's executive committee that ninety-two percent of AOL's subscribers (who by then numbered over ten million) were using client access software that included Internet Explorer. A year earlier, the same type of data had shown that only thirty-four percent of AOL subscribers were using AOL client software that included Internet Explorer. The marked increase resulted in no small part from AOL's efforts to convert its existing subscribers to the newest version of its client software.

297. Even if an AOL subscriber obtains the new client software that includes Internet Explorer, he can still browse the Web using any browsing software, including Navigator, that happens to be installed on his hard drive. It is unlikely that many users will go to this effort, however, given the ease of browsing with the software that comes with AOL's client software. The average AOL user, being perhaps less technically sophisticated than the average IAP subscriber, is particularly unlikely to expend any effort to use browsing software other than that which comes included with the AOL software. AOL, acting pursuant to the provisions of the March 1996 agreement, has not made it easy for its subscribers to locate, download, and install a version of Navigator configured for its service. Consequently, those AOL subscribers who did not already have Navigator on their systems by the time that agreement took effect were even less likely to use Navigator.

298. So when Microsoft executives learned that ninety-two percent of AOL subscribers were using client software that included Internet Explorer, they could rest assured that virtually the same percentage of AOL's subscribers were using Internet Explorer whenever they connected to the Internet with AOL. In fact, an examination of the "hit" data collected by AdKnowledge indicates that as of early 1999, only twelve percent of AOL subscribers were using Navigator when they browsed the Web (see Section V.H.1., infra, for a description of the method by which AdKnowledge collects data). AOL (and its CompuServe subsidiary), in turn, accounted for a very large percentage of all IAP subscribers. In fact, according to data Microsoft collected and used internally, AOL and CompuServe accounted for sixty-five percent of the combined subscriber base of the top eighty IAPs in late 1997. It is thus a reasonable deduction that the restrictive terms Microsoft induced AOL to accept in 1996 pre-empted a substantial part of the IAP channel for Internet Explorer.

299. On November 24, 1998, AOL and Netscape agreed that AOL would acquire Netscape for 4.3 billion dollars' worth of AOL stock. In a related transaction, AOL entered into a three-year strategic alliance with Sun, pursuant to which Sun would develop and market both its and Netscape's server software and would manage the companies' joint efforts in the area of electronic commerce. AOL purchased Netscape not just for its browsing technology, but also for its electronic commerce business, its portal site, its brand recognition, and its talented work force. To the extent AOL was paying for Netscape's browser business, its primary goal was not to compete for usage share against Internet Explorer. Rather, AOL was interested in Navigator to the extent that it drove Web traffic to Netscape's popular portal site, NetCenter. AOL was also interested in ensuring that an alternative to Internet Explorer remained viable; it wanted the option of dropping Internet Explorer to retain enough vitality so that it would not be at

the mercy of Microsoft for software upon which the success of its online service largely depended. Finally, AOL was interested in keeping Navigator alive in order to ensure that Microsoft did not gain total control over Internet standards.

300. AOL had the right under its agreement with Microsoft to terminate the distribution and promotion provisions relating to Internet Explorer on December 31, 1998. If AOL had decided to terminate those provisions, the March 1996 agreement would otherwise have remained in effect, and AOL could have continued to base its proprietary access software on Internet Explorer, taking advantage of Microsoft's engineering and technical support. Microsoft, however, would have had the option of removing AOL from the OLS folder. What is more, Chase informed AOL that Microsoft might react to AOL's termination of the restrictive provisions by discontinuing the OLS folder altogether, which would have disadvantaged AOL's subsidiary OLS, CompuServe, which also enjoyed a place in the OLS folder.

301. Despite its acquisition of Netscape, AOL did not exercise its right to terminate the exclusivity provisions of its agreement with Microsoft at the end of 1998. AOL executives made the reasons clear to AOL's board of directors on November 17, 1998, when they presented the Netscape/Sun transactions for the board's approval. They wrote:

> In exchange for using IE as our primary browser component, Microsoft bundles [AOL] in the "Online Services Folder" on the Windows desktop. This is an important, valued source of new customers for us, and therefore something we are inclined to continue. Microsoft has made it clear that they will not continue to include us in Windows if we don't agree to continue our "virtual exclusivity" provisions for use of IE within [AOL]. . . . There are benefits to [Netscape] of replacing IE

> with the [Netscape] browser—it would dramatically shift browser market share (from about 50/50 today to 65/35 in favor of [Netscape]). However, our present intent is to continue with IE, partly to get the continued marketing benefits of Windows bundling, and partly to maximize the likelihood of continued "détente" with Microsoft.

By not exercising its right to terminate the "virtual exclusivity" provisions in the agreement with Microsoft, AOL commited itself to abide by those restrictions until January 1, 2001.

302. AOL does not believe that it must make every possible use of Netscape's browsing software, and maximize Navigator's usage share, in order to justify its purchase of Netscape. Now that AOL has the capability to produce its own state-of-the-art componentized browsing software, however, the fact remains that, of the various advantages Microsoft currently offers AOL in exchange for its agreement to distribute and promote Internet Explorer with near exclusivity, the only one likely to still be of great value to AOL at the beginning of the new millennium is the inclusion of AOL's client software, and the promotion of its service, within Windows. Assuming Microsoft continues to offer that placement to AOL after January 1, 2001, the extent to which AOL continues to distribute and promote Internet Explorer to the exclusion of other browsing software will depend largely on the value that AOL assigns to that placement and to any new forms of consideration Microsoft offers. With respect to the value of placement in the OLS folder, AOL registered approximately 970,000 new subscribers through the OLS folder in the fiscal year ending in June 1998. This represented eleven percent of the new subscriptions AOL gained that year, and it was enough to prompt AOL executives in November 1998 to describe the

OLS folder to the AOL board as an "important, valued source of new customers for us."

303. If AOL were to halt its distribution and promotion of Internet Explorer, the effect on Internet Explorer's usage share would be significant, for AOL's subscribers currently account for over one third of Internet Explorer's installed base. But even if AOL stops distributing Internet Explorer after January 1, 2001 and updates its entire subscriber base to client software that includes its own or some other proprietary browsing software, Microsoft will still have ensured that, over the preceding four years (AOL subscribers began using proprietary access software based on Internet Explorer in November 1996), a very large majority of AOL subscribers used Internet Explorer whenever they browsed the Web through the AOL service. This period is significantly longer than the two years Gates thought AOL's obligations would have to last in order for the deal to be worthwhile to Microsoft.

304. AOL's subscribers now number sixteen million, and a substantial part of all Web browsing is done through AOL's service. By granting AOL valuable desktop real estate (to MSN's detriment) and other valuable consideration, Microsoft succeeded in capturing for Internet Explorer, and holding for a minimum of four years, one of the single most important channels for the distribution of browsing software. Starting the day Microsoft announced the March 1996 agreement with AOL, and lasting at least until AOL announced its acquisition of Netscape in November 1998, developers had reason to look into the foreseeable future and see that non-Microsoft software would not attain stature as the standard platform for network-centric applications. Microsoft exploited that interval to enhance dependence among developers on Microsoft's proprietary interfaces for network-centric applications—dependence that will continue to inure to Microsoft's benefit even if AOL stops distributing Internet Explorer in the future. The AOL

coup, which Microsoft accomplished only at tremendous expense to itself and considerable deprivation of consumers' freedom of choice, thus contributed to extinguishing the threat that Navigator posed to the applications barrier to entry.

ii. Other Online Services

305. In the summer and fall of 1996, Microsoft entered into agreements with three other OLSs, namely, AT&T WorldNet, Prodigy, and AOL's subsidiary, CompuServe. The provisions of these agreements were substantially the same as those contained in the March 1996 agreement between Microsoft and AOL. As with the AOL agreement, Microsoft did not deign to waive the restrictive terms in these OLS agreements when it waived similar terms in the Referral Server agreements in the spring of 1998. The OLSs were discontented with the provisions that limited their ability to distribute and promote non-Microsoft browsing software. Prodigy, for one, found those provisions objectionable and tried, unsuccessfully, to convince Microsoft to make the terms less restrictive. AT&T WorldNet's negotiator also told his Microsoft counterpart, Brad Silverberg, that AT&T wanted to remain neutral as to browsing software. Despite their reservations, the OLSs accepted Microsoft's terms because they saw placement in the OLS folder as crucial, and Microsoft made clear that it would only accord such placement to OLSs that agreed to give Internet Explorer exclusive, or at least extremely preferential, treatment. As one Microsoft negotiator reported to Chase about AT&T WorldNet, "It's very clear that they really really want to be in the Windows box." The OLSs became even more desperate for inclusion in the OLS folder once it was announced that their largest competitor, AOL, had already won placement there. One Prodigy executive wrote to another two weeks after his company signed the agreement with Microsoft, "it was absolutely critical to Prodigy's business" and "essential in order to remain

competitive" that Prodigy obtain Microsoft's agreement to include the Prodigy Internet service icon in the OLS folder.

306. Although none of these OLSs possessed subscriber bases approaching AOL's, they comprised, along with MSN, the most significant OLSs other than AOL. By making arrangements with them similar to the one it enjoyed with AOL, Microsoft ensured that, for as long as the agreements remained in effect, the overwhelming majority of OLS subscribers would use Internet Explorer whenever they accessed the Internet. Since AOL owns CompuServe, the acquisition of Netscape may affect CompuServe's arrangement with Microsoft in the future; however, the acquisition does not alter the incentives for the other OLSs to enter new agreements with Microsoft similar to the ones signed in 1996.

d. Effect of Microsoft's Actions in the IAP Channel

307. As described above, Microsoft gave valuable consideration at no charge to IAPs that agreed to distribute and promote a product that brought no revenue to Microsoft. By tendering additional valuable perquisites (at the cost of lost revenue), Microsoft induced IAPs to restrict drastically their distribution and promotion of Navigator. With the offer of still other concessions, Microsoft induced IAPs to turn subscribers already using Navigator into Internet Explorer users.

308. As Microsoft hoped and anticipated, the inducements it gave out gratis, as well as the restrictive conditions it tied to those inducements, had, and continue to have, a substantial exclusionary impact. First, many more copies of Internet Explorer have been distributed, and many more IAPs have standardized on Internet Explorer, than would have been the case if Microsoft had not invested great sums, and sacrificed potential sources of revenue, with the sole purpose of protecting the applications barrier to entry.

Second, the restrictive terms in the agreements have prevented IAPs from meeting consumer demand for copies of non-Microsoft browsing software pre-configured for those services. The IAPs subject to the most severe restrictions comprise fourteen of the top fifteen access providers in North America and account for a large majority of all Internet access subscriptions in this part of the world.

309. Not surprisingly, the inducements that Microsoft gave out and the restrictions it conditioned them upon have resulted in a substantial increase in Internet Explorer's usage share. A study Microsoft conducted shows that at the end of 1997, Internet Explorer enjoyed a ninety-four percent weighted average share of shipments of browsing software by ISPs that had agreed to make Internet Explorer their default browser. By contrast, the study shows that Internet Explorer had only a fourteen percent weighted average share of shipments of browsing software by ISPs that had not agreed to make Internet Explorer their default browser. The same study shows that Microsoft's weighted average share of browser usage by subscribers to ISPs that had made Internet Explorer their default browser was over sixty percent at the end of 1997, whereas its weighted average share of browser usage by subscribers to ISPs that did not make Internet Explorer their default browser was less than twenty percent.

310. An appropriate use of the AdKnowledge hit data shows the difference in Internet Explorer's success among categories of IAPs subject to different levels of distribution and promotion restrictions (see Section V.H.1., infra, for a description of the method by which AdKnowledge collects data). One category was hits originating from subscribers to IAPs that, according to a chart prepared by Microsoft for its internal use, were not subject to any distribution or promotion restrictions. Another category was hits originating from subscribers to any IAP. A third category was hits originating from subscribers to AOL and CompuServe. The

hit data show that, from January 1997 to August 1998, Internet Explorer's usage share among subscribers to IAPs that were uninhibited by restrictions rose ten points, from about twenty to about thirty percent. Over the same period, Internet Explorer's usage share among all IAP subscribers, including those subject to restrictions, rose twenty-seven points, from twenty-two to forty-nine percent. Finally, Internet's Explorer's usage share among subscribers to two IAPs subject to the most severe restrictions, AOL and CompuServe, rose sixty-five points, from twenty-two to eighty-seven percent. The differences in the degree of Internet Explorer's success in the three categories reveal the exclusionary effect of Microsoft's interdiction of Navigator in the IAP channel.

4. Inducing ICPs to Enhance Internet Explorer's Usage Share at Navigator's Expense

311. ICPs create the content that fills the pages that make up the Web. Because this content can include advertisements and links to download sites, ICPs also provide a channel for the promotion and distribution of Web browsing software. Executives at Microsoft recognized that ICPs were not nearly as important a distribution channel for browsing software as OEMs and IAPs. Nevertheless, protecting the applications barrier to entry was of such high priority at Microsoft that its senior executives were willing to invest significant resources to enlist even ICPs in the effort. Executives at Microsoft determined that ICPs could aid Microsoft's browser campaign in three ways. First, ICPs could help build Internet Explorer's usage share by featuring advertisements and links for Internet Explorer, to the exclusion of non-Microsoft browsing software, on their Web pages. Second, those ICPs that distributed software as well as content could bundle Internet Explorer, instead of Navigator, with those distributions. Finally, ICPs could increase demand for Internet Explorer, and decrease demand

for Navigator, by creating their content with Microsoft technologies, such as ActiveX, that would make the content more appealing in appearance when accessed with Internet Explorer.

312. As early as the fall of 1995, Microsoft executives saw that they could help reinforce the applications barrier to entry by inducing the leading ICPs to focus on Microsoft's browsing technologies. In the October 1995 memorandum that Microsoft executives sent to Gates on Microsoft's browser campaign, one of the suggestions was, "Get 80% of Top Web Sites to Target Our Client." Specifically, the executives wrote:

> Content drives browser adoption, and we need to go to the top five sites and ask them, "What can we do to get you to adopt IE?" We should be prepared to write a check, buy sites, or add features—basically do whatever it takes to drive adoption.

313. By the middle of 1996, this proposal had become corporate policy. Senior executives at Microsoft believed that inducing the ICPs responsible for the most popular Web sites to concentrate their distributional, promotional, and technical efforts on Internet Explorer to the exclusion of Navigator would contribute significantly to maximizing Internet Explorer's usage share at Navigator's expense. When Microsoft began, in late 1996, to enlist the aid of the most popular ICPs, it used an inducement that it had already successfully employed with the top IAPs: Microsoft created an area on the ubiquitous Windows billboard for the promotion of ICPs and then exchanged placement in that area at no charge for the commitment of important ICPs to promote and distribute Internet Explorer exclusively and to create their content with technologies that would make it appear optimally when viewed with Internet Explorer. Microsoft executives referred to this tactic as "strategic barter." As was the case with the IAPs, neither the sacrifice

that Microsoft made to enlist the aid of the top ICPs nor the restrictions it placed on them can be explained except as components of a campaign to protect the applications barrier to entry against Navigator.

314. The Active Desktop was a Microsoft feature that, if enabled, allowed the Windows user to position Web pages as open windows that appear on the background, or "wallpaper" of the Windows desktop. If the Web pages featured "push" technology, they would automatically update themselves by downloading information from their respective servers at times scheduled by the user. Thus, a user could position on his desktop wallpaper Web pages that displayed periodically updated stock prices, sports scores, and news headlines. The Channel Bar was a feature of the Active Desktop. If enabled, the Channel Bar appeared as a rectangular graphic on the desktop wallpaper. It was divided into pre-configured links to the Web sites of certain ICPs that implemented push technology. Microsoft introduced the Active Desktop, including the Channel Bar, as a feature of Internet Explorer 4.0, which it released on September 30, 1997.

315. As pre-configured by Microsoft, the top channel on the Channel Bar linked to a Microsoft Web site, called the "Active Channel Guide," that provided a list of sites enabled with push technology. The next five channels were each labeled with a generic category such as "News & Technology" or "Business." Clicking on one of these five channels brought up a display of icons for specific Web sites. For example, clicking on the "Sports" channel brought up a display including icons for sports-related Web sites such as ESPN SportsZone and CNN SI. Below the five generic category channels were branded ones, each of which would link the user directly to a specific ICP's Web site.

316. Considering how ICPs generate revenue, it is not surprising that they attached great value to placement on the Channel Bar. Most ICPs charge fees for placing

advertisements on their Web pages. In addition, some ICPs display certain of their content only to users who pay a fee. The higher the volume of user traffic an ICP's site attracts, the higher the rates it can charge for the placement of advertising on its sites. Higher volume also brings increased revenue to ICPs that charge users for content. Microsoft pre-configured Internet Explorer 4.0 so that the Active desktop and the Channel Bar would appear by default on a user's Windows 95 PC system, and Microsoft forbade OEMs to disable either feature. Microsoft and the ICPs consequently surmised that a very high volume of user traffic would be driven to the Web sites for which channels appeared on the Channel Bar. Intuit, for one, believed that placement on the Windows desktop would provide it with unparalleled promotional and distributional advantages. As a result, the company was prepared to pay a substantial fee for placement on the Channel Bar. The managers of ZDNet felt the same way, as did the executives responsible for Disney's Internet content. Some ICPs, including Intuit, even admitted to Microsoft that inclusion on the Channel Bar was critical to them and asked what they would be obliged to pay to be included.

317. Based on the interest ICPs expressed, as well as Microsoft's own assessment of the value of placement on the Channel Bar, executives at Microsoft considered charging ICPs for inclusion on the Channel Bar. They estimated that ICPs appearing directly on the Channel Bar would pay as much as $10 million per year, and that even ICPs appearing under the generic channels would pay a couple of million dollars each annually. These estimates proved to comport well with the value that ICPs themselves actually attached to inclusion in the Channel Bar, at least before the feature had been tested in the marketplace. For example, in December 1996, more than nine months before the Active Desktop made its debut, Microsoft signed an agreement with PointCast pursuant to which PointCast agreed to pay $10

million for the first year that its channel would appear directly on the Channel Bar.

318. Following the signing of its agreement with PointCast, Microsoft proceeded to enter similar "Top Tier" or "Platinum" agreements with twenty-three other ICPs, all in the summer and early fall of 1997. Microsoft used the term "Top Tier" to refer to the four non-Microsoft ICPs (including PointCast) given placement directly on the Channel Bar and the term "Platinum" to describe the twenty ICPs included in the five generic categories accessible from the Channel Bar. Although the agreements were individually negotiated and their terms varied to some extent, the typical agreement obligated Microsoft to promote the ICP's business in three ways. First, Microsoft agreed to include on the Channel Bar (or in one of the lists accessible directly from the Channel Bar) a link that would send a user directly to the ICP's "push" site. Second, Microsoft agreed to promote the ICP's content in national public-relations and computer-industry events, as well as on Microsoft Web sites. Finally, Microsoft agreed to include introductory content from the ICP with certain distributions of Windows and Internet Explorer.

319. The agreements did not obligate the Top Tier and Platinum ICPs to pay money to Microsoft in exchange for any of the benefits, including placement on the Windows desktop, that Microsoft extended to them. Rather, the agreements obligated the ICPs to compensate Microsoft in other ways. Although the agreement that PointCast signed purported to call for a payment of ten million dollars to Microsoft, it entitled PointCast to a discount on the full amount if it behaved as other ICPs undertook to do in their own Top Tier and Platinum agreements with Microsoft.

320. The first obligation that the ICPs undertook was to distribute Internet Explorer and no "Other Browser" in connection with any custom Web browsing software or CD-ROM content that they might offer. The term "Other

Browser" was defined in the agreements as Web browsing software that ranked first or second by organizations in the business of measuring the usage of browsing software. This obligation was pertinent only to the six Top Tier and Platinum ICPs that distributed Web browsing software during the term of the agreements: PointCast, CNet, Intuit, AOL, Disney, and National Geographic.

321. The Top Tier and Platinum agreements also required the signatory ICPs to promote Internet Explorer and no "Other Browser" as their "browser of choice." In particular, the ICPs were required to display a logo for Internet Explorer and no "Other Browser" on the home page of the sites specified in the agreements and on any other pages on which the ICP typically displayed such links. The ICPs were also required to place Internet Explorer download links on their Web sites and to remove any links to Navigator's download site. Aggregating the Web sites offered by the twenty-four Top Tier and Platinum ICPs, the number of Web sites affected by this provision was thirty-one.

322. A third provision that the ICPs accepted in return for placement on the Channel Bar was a prohibition against their entering agreements with a vendor of an "Other Browser" whereby the ICPs would pay money or provide other consideration to the vendor in exchange for the vendor's promotion of the ICP's branded content. Finally, the agreements required the ICPs, in designing their Web sites, to employ certain Microsoft technologies such as Dynamic HTML and ActiveX. Some of the agreements actually required the ICPs to create "differentiated content" that was either available only to Internet Explorer users or would be more attractive when viewed with Internet Explorer than with any "Other Browser." For example, the agreement with Intuit provided: "Some differentiated content may be available only to IE users, some may simply be 'best

when used with IE,' with acceptable degradation when used with other browsers."

323. The ICPs were so intent on gaining placement on the Channel Bar that they even complied, albeit reluctantly, when Microsoft imposed restrictions not contained in the Top Tier and Platinum agreements. For example, Microsoft demanded that Disney remove its distinctive branding from its link on Navigator's user interface and threatened to remove Disney from the Channel Bar if it did not accede. Executives at Disney believed that such a requirement went beyond the language of the Top Tier agreement that Disney had signed with Microsoft, but they saw no recourse in making an issue of the matter, for Microsoft could keep the Disney icon off the Channel Bar during the pendency of the dispute, and Microsoft would be less amenable to promotional opportunities for Disney in the future. Therefore, Disney capitulated. In a similar fashion, a Microsoft employee told a counterpart at Wired Digital that even if the agreement between the companies did not technically prohibit it, Wired Digital would be violating the spirit of its agreement if it placed a link to any of its subsidiary sites on Navigator's user interface. What Microsoft wanted to avoid were announcements suggesting that any of Microsoft's ICP partners were also cooperating with Netscape.

324. Intuit is a leading developer of software designed to help individuals and small businesses manage their finances. A consumer can use one of Intuit's popular products by purchasing a copy of the software, but Intuit makes additional features available through its Quicken.com Web site. Thus, Intuit is both an ISV and an ICP. Beginning in late 1995, Intuit distributed Navigator with its products in order to ensure that its users could access the features provided through Quicken.com. In 1996, Microsoft commenced the process of converting Intuit from a Netscape partner to a distributor of Internet Explorer. In July of that

year, Gates reported to other Microsoft executives on his attempt to convince Intuit's CEO to distribute Internet Explorer instead of Navigator:

> I made it clear to him that beyond giving him the best browser technology for no cost that we were only will[ing] to do some very modest favors in addition to that. . . . I was quite frank with him that if he had a favor we could do for him that would cost us something like $1M to do that in return for switching browsers in the next few months I would be open to doing that.

325. Intuit did not accept Gates' offer immediately, but less than a year later, in June 1997, Intuit became one of the ICPs to sign a Platinum agreement with Microsoft. This allowed Intuit to place a link to Quicken.com under the "Business" heading on Microsoft's Channel Bar. In return, however, the agreement required Intuit to distribute Internet Explorer, and no "Other Browser," with its software products, including those not distributed through the Channel Bar. Intuit also agreed to the other terms, relating to the promotion of browsing technologies, business relationships with Netscape, and the adoption of Internet Explorer technologies, that applied to the other Top Tier and Platinum ICPs.

326. Microsoft would have granted Intuit a license to distribute the componentized version of Internet Explorer at no charge even if Intuit had not entered a Platinum Agreement. In the absence of the agreement's restrictive terms, in fact, Intuit likely would have distributed the componentized version of Internet Explorer with its products while simultaneously promoting Navigator and distributing to consumers who requested it a version of Navigator specially-configured for Intuit's products. The only way Intuit could gain a place on the Channel Bar, however, was by agreeing to the provisions that required it to limit its promotion of Navigator, to cease distributing that browser

altogether, and to refuse to pay Netscape to promote Intuit products on Netscape's Web sites. Intuit accepted these terms reluctantly, for Navigator remained a popular product with consumers, and Netscape's Web sites still attracted a great deal of traffic.

327. In addition to the Top Tier and Platinum agreements, Microsoft entered into two other types of agreements with ICPs. First, Microsoft signed so-called "Gold" agreements with between thirty and fifty ICPs. Pursuant to these agreements, Microsoft included ICPs in the "Active Channel Guide" Web site, which appeared whenever a Windows user clicked on the top link on the Channel Bar. In exchange for this promotion, the Gold-agreement ICPs agreed to promote Internet Explorer on at least equal footing with other browsing technology, including Navigator.

328. Second, Microsoft entered into IEAK agreements with between eight and twelve ICPs devoted to business-related content. Under the typical IEAK agreement, Microsoft agreed to include functionality in the IEAK that would facilitate the inclusion of a link to the ICP's Web site under the "Business" category of the Channel Bar. In exchange, the ICPs agreed to distribute Internet Explorer exclusively (to the extent they distributed any browsing software), to promote Internet Explorer as their "browser software of choice," to refrain from promoting any "Other Browser" (defined as in the other ICP agreements) on their Web sites, and to create content that could be accessed optimally only with Internet Explorer.

329. Cross-marketing arrangements in competitive markets do not necessarily make those markets less competitive; however, four characteristics distinguish this case from situations in which such agreements are benign. First, Microsoft was able to offer ICPs an asset whose value competitors could not hope, on account of Microsoft's monopoly power, to match. Second, Microsoft bartered that asset not to increase demand for a revenue-generating

product, but rather to suppress the distribution and diminish the attractiveness of technology that Microsoft saw as a potential threat to its monopoly power. Third, and more specifically, Microsoft prohibited the ICPs from compensating Netscape for promotion of their products even while not attempting to prohibit the promotion itself. This reveals that Microsoft's motivation was not simply a desire to generate brand associations with Internet Explorer. Finally, Microsoft went beyond encouraging ICPs to take advantage of innovations in Microsoft's technology, explicitly requiring them to ensure that their content appeared degraded when viewed with Navigator rather than Internet Explorer. Microsoft's desire to lower demand for Navigator was thus independent of, and far more malevolent than, a simple desire to increase demand for Internet Explorer.

330. The terms of Microsoft's agreements with ICPs cannot be explained in customary economic parlance absent Microsoft's obsession with obliterating the threat that Navigator posed to the applications barrier to entry. Absent that obsession, Microsoft would not have given ICPs at no charge licenses to distribute Internet Explorer. What is more, Microsoft would not have incurred the cost of componentizing Internet Explorer and then licensed that version to Intuit at no charge. By sacrificing opportunities to cover its costs and even make a profit, Microsoft advanced its strategic goal of maximizing Internet Explorer's usage share at Navigator's expense. Whereas Microsoft might have developed the Channel Bar without ulterior motive as a matter of product improvement, it would not have exchanged placement on the Channel Bar for terms as highly and broadly restrictive as the ones it actually extracted from ICPs. Nevertheless, and to Microsoft's dismay, circumstances prevented these restrictions from having a large impact on the relative usage shares of Internet Explorer and Navigator.

331. Despite Microsoft's and the ICPs' expectations to the contrary, consumers showed little interest in the Channel Bar, or in the Active Desktop in general, when the features debuted in the fall of 1997. Moreover, reviews of the Channel Bar in computer-related publications were generally unfavorable. The Channel Bar may not have attracted consumer interest, but the ICP agreements relating to the Channel Bar did attract controversy. Indeed, Gates faced pointed questions about them when he appeared before the Senate Judiciary Committee in March 1998. Microsoft took several measures to quell the public criticism in early April 1998. First, it waived the most restrictive terms in the Top Tier and Platinum agreements; thereafter, the agreements required ICPs merely to promote Internet Explorer in a manner at least equal to their promotion of Navigator. Second, Microsoft made no attempt to renew the Gold and IEAK agreements, which had expired by their own terms in March 1998. Third, Microsoft authorized its OEM licensees to configure the Windows 98 desktop so that the Channel Bar would not appear by default, and nearly every major OEM availed itself of the permission. Deeming the Channel Bar more trouble than it was worth, Microsoft decided to eliminate the feature entirely from future versions of Windows, including Windows 98 updates. Therefore, the provisions requiring ICPs to exclusively distribute and promote Internet Explorer had all expired within seven months of the Channel Bar's release. All of the Top Tier and Platinum agreements had expired by their own terms by December 31, 1998. In light of its decision to discontinue the Channel Bar, Microsoft did not seek to renew any of them.

332. For a period of about eight months, however, agreements with Microsoft had prohibited approximately thirty-four ICPs from distributing Navigator and from promoting Navigator in all but a few ways. For an overlapping period of between a year and a year-and-a-half, those thirty-four ICPs, plus between thirty and fifty more, were required to promote Internet Explorer at least as

prominently as they promoted Navigator. Although the affected Web sites made up only a tiny percentage of those existing on the Web, they comprised the offerings of all but a few of the most popular ICPs. If the estimation of one Microsoft employee in June 1996 can be considered accurate, the affected ICPs accounted for a significant percentage of the Web traffic in North America. Still, there is not sufficient evidence to support a finding that Microsoft's promotional restrictions actually had a substantial, deleterious impact on Navigator's usage share. For one thing, only six of the affected ICPs distributed any Web browsing software bundled with their products during the period in which Microsoft's distributional restrictions remained in effect. AOL obviously distributed a substantial volume of Web browsing software during this period, but since AOL was separately precluded under its Online Services Folder agreement from distributing virtually any non-Microsoft browsing software, AOL would not have distributed a significant number of Navigator copies even if it had not entered a Top Tier agreement with Microsoft.

333. Pursuant to its agreement with Microsoft, Intuit distributed over five million copies of Internet Explorer with the 1998 versions of its products. Microsoft had offered Intuit a componentized browser while Netscape had not, and it stands to reason that Intuit would in all probability have distributed close to the same number of Internet Explorer copies even absent the distributional restrictions imposed by its contract. Still, Intuit had distributed over five million copies of Navigator with the 1997 versions of its products. Unconstrained by its agreement with Microsoft, Intuit might have distributed with its 1998 products a sum approaching that number of Navigator copies along with the componentized version of Internet Explorer (particularly if the CD-ROM represented its primary distribution vehicle). Of the affected ICPs (excluding AOL), Intuit almost certainly distributed the most Web browsing software bundled with its products.

334. All of the Top Tier, Platinum, and IEAK ICPs were capable of including download links on their Web pages. While many of these ICPs had included such links for Navigator prior to entering agreements with Microsoft, only Internet Explorer download links were allowed while the restrictive terms were in effect. On the whole, it is reasonable to deduce from the evidence that the restrictions Microsoft imposed on ICPs prevented the distribution and installation of a significant quantity, but certainly less than ten million, copies of Navigator.

335. The terms Microsoft imposed did prevent a number of the ICPs otherwise inclined to do so from compensating Netscape for its promotion of the ICPs' content in Navigator or on Netscape's Web sites. While they were in effect, Microsoft's restrictions probably deprived Netscape of revenue measured in millions of dollars, but nowhere near $100 million.

336. It appears that, at the time the obligation expired, Microsoft had not yet begun to enforce its requirement that the Top Tier, Platinum, and IEAK ICPs develop content that would appear more attractive when viewed with Internet Explorer than when viewed with Navigator. Moreover, there is no evidence that any ICP other than Disney developed any "differentiated content" in response to its agreement with Microsoft. Therefore, there is insufficient evidence to find that the requirements that Microsoft sought to impose with respect to the use of Microsoft-specific browsing technologies had any discernible, deleterious impact on Navigator's usage share.

5. Directly Inducing ISVs to Rely on Microsoft's Browsing Technologies Rather than APIs Exposed by Navigator

337. Since 1995, more and more ISVs have, like Intuit, enhanced the features of their applications by

designing them to take advantage of the type of content and functionality accessible through browsing software. An increasing number of these applications actually rely on browsing software to function. Microsoft's efforts to maximize Internet Explorer's share of browser usage at Navigator's expense were intended to encourage developers to use Windows-specific technologies when they wrote their applications to rely on a browser. In addition to creating this incentive indirectly, by disadvantaging Navigator, Microsoft targeted individual ISVs directly, extracting from them commitments to make their Web-centric applications reliant on technology specific to Internet Explorer.

338. Because of the importance of "time-to-market" in the software industry, ISVs developing software to run on Windows products seek to obtain beta releases and other technical information relating to Windows as early and as consistently as possible. Since Microsoft decides which ISVs receive betas and other technical support, and when they will receive it, the ability of an ISV to compete in the marketplace for software running on Windows products is highly dependent on Microsoft's cooperation. Netscape learned this lesson in 1995.

339. In dozens of "First Wave" agreements signed between the fall of 1997 and the spring of 1998, Microsoft has promised to give preferential support, in the form of early Windows 98 and Windows NT betas, other technical information, and the right to use certain Microsoft seals of approval, to important ISVs that agree to certain conditions. One of these conditions is that the ISVs use Internet Explorer as the default browsing software for any software they develop with a hypertext-based user interface. Another condition is that the ISVs use Microsoft's "HTML Help," which is accessible only with Internet Explorer, to implement their applications' help systems.

340. By exchanging its vital support for the agreement of leading ISVs to make Internet Explorer the default

browsing software on which their products rely, Microsoft has ensured that many of the most popular Web-centric applications will rely on browsing technologies found only in Windows and has increased the likelihood that the millions of consumers using these products will use Internet Explorer rather than Navigator. Microsoft's relations with ISVs thus represent another area in which it has applied its monopoly power to the task of protecting the applications barrier to entry.

6. Foreclosing Apple as a Distribution Channel for Navigator

341. In the summer of 1995, Microsoft had been willing to cede to Netscape the development of browsing software for the Mac OS, provided that Netscape would stop competing with the platform-level browsing technologies that Microsoft was developing for its 32-bit Windows products. The genesis of this offer had been Microsoft's belief that Netscape could never become the leading platform for network-centric software development if it did not distribute a middleware layer for the soon-to-be dominant 32-bit Windows platform. But once Netscape confirmed its determination to offer a middleware layer that would expose the same set of APIs on Windows, the Mac OS, and other platforms, Microsoft recognized that it needed to stifle the attention that developers would be inclined to devote to those APIs, even when they rested on top of a non-Windows platform like the Mac OS. After all, if Navigator became so popular on the Mac OS that developers made extensive use of the APIs exposed by that version of Navigator, those developers would be disposed to take advantage of identical APIs exposed by the version of Navigator written for the dominant platform, Windows. Microsoft thus committed itself to convincing developers that applications relying on APIs exposed by Navigator would not reach as many Mac OS users as applications that invoked technologies found exclusively in Microsoft's

browsing platform. To this end, Microsoft set out to recruit Mac OS users to Internet Explorer, and to minimize Navigator's usage share among Mac OS users.

342. Just as pre-installation and promotion by OEMs is one of the most effective means of raising the usage share of browsing software among users of Intel-compatible PC systems, pre-installation and promotion by Apple is one of the most effective means of raising the usage share of browsing software among the users of Apple PC systems. Recognizing this, Bill Gates consistently urged Microsoft executives to persuade Apple to pre-install the Mac OS version of Internet Explorer on its PC systems and to feature it more prominently than the Mac OS version of Navigator.

343. By the summer of 1996, Apple was already shipping Internet Explorer with the Mac OS, but it was pre-installing Navigator as the default browsing software. After a meeting with Apple in June 1996, Gates wrote to some of his top executives: "I have 2 key goals in investing in the Apple relationship—1) Maintain our applications share on the platform and 2) See if we can get them to embrace Internet Explorer in some way." Later in the same message, Gates expressed his desire that Apple "agree to immediately ship IE on all their systems as the standard browser."

344. One point of leverage that Microsoft enjoyed in its relations with Apple was the fact that ninety percent of Mac OS users running a suite of office productivity applications had adopted Microsoft's Mac Office. In 1997, Apple's business was in steep decline, and many doubted that the company would survive much longer. Observing Apple's poor performance in the marketplace and its dismal prospects for the future, many ISVs questioned the wisdom of continuing to spend time and money developing applications for the Mac OS. Had Microsoft announced in the midst of this atmosphere that it was ceasing to develop new versions of Mac Office, a great number of ISVs,

customers, developers, and investors would have interpreted the announcement as Apple's death notice.

345. Recognizing the importance of Mac Office to Apple's survival, Microsoft threatened to cancel the product unless Apple compromised on a number of outstanding issues between the companies. One of these issues was the extent to which Apple distributed and promoted Internet Explorer, as opposed to Navigator, with the Mac OS.

346. At the end of June 1997, the Microsoft executive in charge of Mac Office, Ben Waldman, sent a message to Gates and Microsoft's Chief Financial Officer, Greg Maffei. The message reflected Waldman's understanding that Microsoft was threatening to cancel Mac Office:

> The pace of our discussions with Apple as well as their recent unsatisfactory response have certainly frustrated a lot of people at Microsoft. The threat to cancel Mac Office 97 is certainly the strongest bargaining point we have, as doing so will do a great deal of harm to Apple immediately. I also believe that Apple is taking this threat pretty seriously . . . .

347. Waldman was actually an advocate for releasing Mac Office 97 promptly, and he pressed for that outcome in his message to Gates and Maffei. Although they applauded Waldman's devotion to the product, Gates and Maffei made clear that the threat of canceling Mac Office was too valuable a source of leverage to give up before Microsoft had extracted acceptable concessions from Apple. Maffei wrote Waldman, "Ben - great mail, but [we] need a way to push these guys and this is the only one that seems to make them move." In his response to Waldman, Gates asked whether Microsoft could conceal from Apple in the coming month the fact that Microsoft was almost finished developing Mac Office 97.

348. In order to assure his superiors that he was pursuing corporate policy despite his personal convictions, Waldman reported to Maffei in his June 1997 message that he had recently told his counterpart at Apple that Maffei "would be recommending to Bill [Gates] that we cancel Mac Office 97." Waldman believed that his counterpart "got the message that we would, in fact, cancel." Waldman went on to write that when his counterpart had asked what specific problems Microsoft had with Apple's recent response to Microsoft's proposals, Waldman had replied by mentioning four issues, including "IE equal access." By that, Waldman meant Microsoft's demand that the Mac OS make Internet Explorer just as available to its users as it made Navigator. According to Waldman, the Apple employee had responded that Apple would not be able to change the Mac OS's default browser from Navigator until it released the next version of the operating system product in the summer of 1998.

349. A few days after the exchange with Waldman, Gates informed those Microsoft executives most closely involved in the negotiations with Apple that the discussions "have not been going well at all." One of the several reasons for this, Gates wrote, was that "Apple let us down on the browser by making Netscape the standard install." Gates then reported that he had already called Apple's CEO (who at the time was Gil Amelio) to ask "how we should announce the cancellation of Mac Office . . . ."

350. Within a month of Gates' call to Amelio, Steve Jobs was once again Apple's CEO, and the two companies had settled all outstanding issues between them in three agreements, all of which were signed on August 7, 1997. Under the agreement titled "Technology Agreement," which remains in force today, Microsoft's primary obligation is to continue releasing up-to-date versions of Mac Office for at least five years. Among the obligations that the Technology Agreement places on Apple are several relating to browsing software.

351. First, Apple has agreed, for as long as Microsoft remains in compliance with its obligation to support Mac Office, to "bundle the most current version of Microsoft's Internet Explorer for Macintosh . . . with all system software releases for Macintosh Computers ('MacOS') sold by Apple." The Technology Agreement also provides: "While Apple may bundle browsers other than Internet Explorer with such Mac OS system software releases, Apple will make Internet Explorer for Macintosh the default selection in the choice of all included internet browsers (i.e., when the user invokes the "Browse the Internet" or equivalent icon, the Mac OS will launch Internet Explorer for Macintosh)." In fulfillment of this requirement, Apple did not include Navigator in the default installation of the Mac OS 8.5 upgrade product. In other words, Navigator is not installed on the computer hard drive during the default installation, which is the type of installation most users elect to employ. Therefore, most users who upgraded their Macintosh systems to Mac OS 8.5 were unable to access Navigator without doing a customized installation. Having already installed an altogether adequate browser (Internet Explorer) when the Mac OS 8.5 upgrade completed its default installation process, however, most users are unlikely to trouble to install Navigator as well.

352. The Technology Agreement further provides that "[a]ny other internet browsers bundled in the Mac OS system software sold by Apple shall be placed in folders in the software as released." In other words, Apple may not position icons for non-Microsoft browsing software on the desktop of new Macintosh PC systems or Mac OS upgrades. Moreover, the agreement states that "Apple will not be proactive or initiate actions to encourage users to swap out Internet Explorer for Macintosh." Both Apple and Microsoft read this term to prohibit Apple from promoting non-Microsoft browsing software. The agreement even states that Apple will "encourage its employees to use Microsoft Internet Explorer for Macintosh for all Apple-sponsored

events and will not promote another browser to its employees." Pursuant to this provision, Apple's management has instructed the firm's employees to not use Navigator in demonstrations at trade shows and other public events. Also with regard to the promotion of browser technology, the agreement requires Apple to display the Internet Explorer logo on "all Apple-controlled web pages where any browser logo is displayed." Finally, the agreement grants Microsoft the right of first refusal to supply the default browsing software for any new operating system product that Apple develops during the term of the agreement.

353. At the same time that it entered the Technology Agreement, Microsoft concluded a "Preferred Stock Purchase Agreement" and a "Patent Cross License Agreement" with Apple. These latter two agreements place obligations on Microsoft that are unrelated to Mac Office, and they bind Apple in areas other than browsing software. The fact that Microsoft and Apple entered two other agreements at the same time that they entered the Technology Agreement does not change the fact that Microsoft's commitment to continue developing Mac Office was at least partial consideration for Apple's commitment to distribute and promote Internet Explorer more favorably than Navigator. Indeed, the language of the agreements themselves demonstrates that Microsoft and Apple saw the Mac Office and Internet Explorer obligations as more closely linked to each other than to any other obligations the parties simultaneously undertook: Whereas the provision in the Technology Agreement setting forth Apple's obligations relating to browsing software explicitly states that those obligations will last as long as Microsoft complies with its obligation to continue supporting Mac Office, the provisions in the other two agreements describing the patent cross-license and Microsoft's purchase of Apple stock mention neither browsing software nor Mac Office.

354. That the Mac Office and browsing software obligations are tied to each other is highlighted by the fact that the Microsoft executives who negotiated the agreement believe that Microsoft's remedy, were Apple to fail to meet its obligations with respect to browsing software, would be to discontinue Mac Office. When, in February 1998, a Microsoft employee proposed giving Apple an HTML control in exchange for Apple's agreement to use Internet Explorer as its standard browser internally, Waldman informed the employee that Apple was already obligated to use Internet Explorer as its standard browser internally and that Microsoft would revive the threat to discontinue Mac Office if Apple failed to comply with its obligation. In Waldman's words:

> Sounds like we give them the HTML control for nothing except making IE the "standard browser for Apple?" I think they should be doing this anyway. Though the language of the agreement uses the word "encourage," I think that the spirit is that Apple should be using it everywhere and if they don't do it, then we can use Office as a club.

For at least a year after the Technology Agreement went into effect, Waldman and other Microsoft employees continued to use the threat of reduced commitment to Mac Office in holding Apple to its commitments to support Internet Explorer.

355. Apple increased its distribution and promotion of Internet Explorer not because of a conviction that the quality of Microsoft's product was superior to Navigator's, or that consumer demand for it was greater, but rather because of the in terrorem effect of the prospect of the loss of Mac Office. To be blunt, Microsoft threatened to refuse to sell a profitable product in whose development the company had already invested substantial resources, and which was virtually ready for shipment. Not only would this ploy have

wasted sunk costs and sacrificed substantial profit, it also would have damaged Microsoft's goodwill among Apple's customers, whom Microsoft had led to expect a new version of Mac Office. The predominant reason Microsoft was prepared to make this sacrifice, and the sole reason that it required Apple to make Internet Explorer its default browser and restricted Apple's freedom to feature and promote non-Microsoft browsing software, was to protect the applications barrier to entry. More specifically, the requirements and restrictions relating to browsing software were intended to raise Internet Explorer's usage share, to lower Navigator's share, and more broadly to demonstrate to important observers (including consumer, developers, industry participants, and investors) that Navigator's success had crested. Had Microsoft's only interest in developing the Mac OS version of Internet Explorer been to enable organizational customers using multiple PC operating-system products to standardize on one user interface for Web browsing, Microsoft would not have extracted from Apple the commitment to make Internet Explorer the default browser or imposed restrictions on its use and promotion of Navigator.

356. Microsoft understands that PC users tend to use the browsing software that comes pre-installed on their machines, particularly when conspicuous means of easy access appear on the PC desktop. By guaranteeing that Internet Explorer is the default browsing software on the Mac OS, by relegating Navigator to less favorable placement, by requiring Navigator's exclusion from the default installation for the Mac OS 8.5 upgrade, and by otherwise limiting Apple's promotion of Navigator, Microsoft has ensured that most users of the Mac OS will use Internet Explorer and not Navigator. Although the number of Mac OS users is very small compared to the Windows installed base, the Mac OS is nevertheless the most important consumer-oriented operating system product next to Windows. Navigator needed high usage share among Mac

OS users if it was ever to enable the development of a substantial body of cross-platform software not dependent on Windows. By extracting from Apple terms that significantly diminished the usage of Navigator on the Mac OS, Microsoft severely sabotaged Navigator's potential to weaken the applications barrier to entry.

G. Microsoft's Success in Excluding Navigator from the Channels that Lead Most Efficiently to Browser Usage

357. The cumulative effect of the stratagems described above was to ensure that the easiest and most intuitive paths that users could take to the Web would lead to Internet Explorer, the gate controlled by Microsoft. Microsoft did not actually prevent users from obtaining and using Navigator (although it tried to do as much in June 1995), but Microsoft did make it significantly less convenient for them to do so. Once Internet Explorer was seen as providing roughly the same browsing experience as Navigator, relatively few PC users showed any inclination to expend the effort required to obtain and install Navigator. Netscape could still carpet bomb the population with CD-ROMs and make Navigator available for downloading. In reality, however, few new users (i.e., ones not merely upgrading from an old version of Navigator to a new one) had any incentive to install—much less download and install—software to replicate a function for which OEMs and IAPs were already placing perfectly adequate browsing software at their disposal. The fact that Netscape was forced to distribute tens of millions of copies of Navigator through high-cost carpet-bombing in order to obtain a relatively small number of new users only discloses the extent of Microsoft's success in excluding Navigator from the channels that lead most effectively to browser usage.

H. The Success of Microsoft's Effort to Maximize Internet Explorer's Usage Share at Navigator's Expense

358. Microsoft's efforts to maximize Internet Explorer's share of browser usage at Navigator's expense have done just that. The period since 1996 has witnessed a large increase in the usage of Microsoft's browsing technologies and a concomitant decline in Navigator's share. This reversal of fortune might not have occurred had Microsoft not improved the quality of Internet Explorer, and some part of the reversal is undoubtedly attributable to Microsoft's decision to distribute Internet Explorer with Windows at no additional charge. The relative shares would not have changed nearly as much as they did, however, had Microsoft not devoted its monopoly power and monopoly profits to precisely that end.

1. The Change in the Usage Shares of Internet Explorer and Navigator

359. A developer of network-centric applications wants as many consumers as possible to acquire and use its products. It knows that only consumers running a browser that exposes the requisite APIs will be able to use network-centric applications that rely on those APIs. So in deciding whether to concentrate its development work on APIs exposed by Netscape's Web browsing software or Microsoft's, one of the questions a developer will ask is how much Navigator is being used in relation to Internet Explorer. Dividing the total usage of each browser product by the total usage of all browsing software (i.e., usage of the installed base) answers this question, for it reveals the proportion of total usage accounted for by each product. The relative attractiveness to developers of Navigator and Internet Explorer thus depends to a large extent on their relative shares of all browser usage.

360. According to estimates that Microsoft executives cited to support their testimony in this trial, and those on which Microsoft relied in the course of its business planning, the shares of all browser usage enjoyed by Navigator and Internet Explorer changed dramatically in favor of Internet Explorer after Microsoft began its campaign to protect the applications barrier to entry. These estimates show that Navigator's share fell from above eighty percent in January 1996 to fifty-five percent in November 1997, and that Internet Explorer's share rose from around five percent to thirty-six percent over the same period. In April 1998, Microsoft relied on measurements for internal planning purposes that placed Internet Explorer's share of all browser usage above forty-five percent. These figures are broadly consistent with ones AOL relied on in evaluating its acquisition of Netscape: AOL determined that Navigator's share had fallen from around eighty percent at the end of 1996 to the "mid 50% range" in July 1998 and that Internet Explorer's share had climbed to between forty-five and fifty percent of the domestic market by late 1998.

361. Before a developer sinks costs into writing applications that rely on APIs exposed by Navigator or Internet Explorer, the developer will also want to know what share of browser usage each of the competing platforms will enjoy in the future, when the developer's applications will reach the marketplace, and even farther into the future, when the developer will try to sell updated versions of those applications. Dividing the new usage of each browser product by the new usage of all browsing software (i.e., incremental usage) helps to formulate a prediction. If a browser product's current share of all browser usage is fifty percent, and its share of incremental browser usage is thirty percent, the product's share of all browser usage will, assuming the share of incremental usage does not rise, gradually approach thirty percent, as the size of the population of browser users grows and current users update their PC systems. So Navigator's and Internet Explorer's

relative attractiveness as platforms also depends greatly on their relative shares of incremental browser usage. Microsoft's tactics were focused on channels for the distribution of new browsing software. Moreover, excluding the installed base from the calculation heightens the sensitivity with which share of incremental browser usage reacts to contemporaneous forces. Microsoft was thus particularly interested in share of incremental browser usage, not only as an indication of Navigator's and Internet Explorer's relative attractiveness as platforms, but also as a sensitive reading of the impact that its actions were having.

362. According to data on which Microsoft relied in the course of its business, Internet Explorer was, by late 1997, capturing a larger share of incremental browser usage than Navigator. Specifically, data that the company then deemed reliable showed that fifty-seven percent of the new users of browsing software in the last six months of 1997 used Internet Explorer, while only thirty-nine percent used Navigator. By February 1998, Microsoft's data showed that sixty-two percent of the new Internet connections over the previous six months were using Internet Explorer, versus thirty-eight percent for Navigator. Since there is no indication that Navigator users as a group employ their browsers more than Internet Explorer users, these data indicate that Internet Explorer's share of incremental usage had exceeded Navigator's by late 1997. This meant that Internet Explorer's share of all browser usage was moving to surpass Navigator's. To Microsoft, these numbers not only marked a significant decline in Navigator's attractiveness as a platform, they also reflected the substantial impact of Microsoft's actions.

363. The "hit" data collected by AdKnowledge comport with the share estimates on which Microsoft and AOL relied internally. AdKnowledge is a company that markets Web advertising services. Once the proprietor of a Web site sells space on its pages to an advertiser,

AdKnowledge stores the advertisements on its servers and delivers them to the appropriate pages when they are accessed by users. One day every month, AdKnowledge monitors the number of times that each of the advertisements appears on users' screens. Each appearance of an advertisement on a user's screen is called a "hit." As part of the hit data it collects, AdKnowledge logs the type of Web browsing software used to access the pages on which the particular advertisements appear. Thus, the AdKnowledge data can be used to calculate monthly snapshots of the shares of usage that particular types of Web browsing software attract from the population of users accessing the Web pages that AdKnowledge monitors. To the extent AdKnowledge can detect the IAPs through which individual users access the monitored sites, the data can also be used to calculate estimates of the usage shares that particular types of browsing software attract from the subscriber bases of particular IAPs.

364. The AdKnowledge data show that Internet Explorer's share of hits to the monitored Web sites rose from twenty percent in January 1997 to forty-nine percent in August 1998 and that Navigator's share fell from seventy-seven to forty-eight percent over the same period. Dividing the change in the respective numbers of Internet Explorer and Navigator hits from the first quarter of 1998 to the third quarter of 1998 by the change in the number of total hits over that same period yields a fifty-seven percent share of incremental browser usage for Internet Explorer and a forty percent share for Navigator. These figures are again consistent with the estimates on which Microsoft and AOL relied internally.

365. When a user accessing the Internet through AOL moves from one Web page to another, AOL temporarily stores, or "caches," the first Web page on a local server. When the subscriber seeks to return to the first page, AOL delivers it from the local server rather than returning to the

Web for a refreshed version of the page. AdKnowledge only counts a hit when one of the monitored advertisements is served to a users' computer from the Web. Thus, AdKnowledge undercounts hits by AOL users. AdKnowledge's attempt to implement "cache-fooling" measures has not eliminated the effects of caching. Largely as a result of the restrictive terms Microsoft prevailed upon AOL to accept, Internet Explorer enjoys a very high share of browser usage by AOL subscribers. Consequently, Internet Explorer's share of all hits detected by AdKnowledge is lower than its actual share of all usage. Correcting for the effects of caching results in virtually no change to the AdKnowledge-based calculation of relative browser usage shares in early 1997; however, it raises by approximately five percent the figure representing Internet Explorer's share of browser usage in the third quarter of 1998.

366. Although AdKnowledge only monitors hits to commercial Web pages, there is no indication that certain types of Web browsing software are used more than others to access commercial, versus non-commercial Web sites. Furthermore, the same share trends reflected in the AdKnowledge data appear in data collected from a prominent academic site. The University of Illinois at Urbana-Champlain monitors, on a weekly basis, the browsing software accessing its popular engineering Web site. The resulting data, which AOL found important enough to rely on in evaluating the purchase of Netscape, yield virtually the same usage share figures as do the AdKnowledge data.

367. AdKnowledge does not undertake to collect data on the use of browsing software to navigate proprietary OLS content or intra-enterprise networks ("intranets"). This does not detract from the value of the AdKnowledge data as a measure of usage share for developers' purposes, however, for most developers of network-centric applications look to write applications that will run through Web sites, not

through OLS proprietary content or pages on an intranet. Most developers will therefore pay most attention to estimates of the extent to which a particular type of browsing software is being used to browse the Web. Moreover, only a very small percentage of the copies of Web browsing software in operation are used exclusively to navigate intranets.

368. The advertisement banners on some Web sites alternate between different advertisements. Assuming that AdKnowledge delivers these advertisements, a single visit to a Web site could register with AdKnowledge as multiple hits as the advertisements "rotate" on the user's screen. This phenomenon does not spoil the essential reliability of the AdKnlowledge data as a reporter of browser usage share, though. In order for there to be a bias of significant proportions, users of either Internet Explorer or Navigator would have to exhibit a special propensity to keep pages open as the advertisements rotate. There is no reason to believe that this is the case.

369. Thus none of the characteristics of the AdKnowledge data invalidate it as a useful measure of browser usage share. It is understandable, therefore, that in evaluating the purchase of Netscape, AOL viewed AdKnowledge's hit data as one of the more reliable indicators of trends in the relative shares of all browser usage enjoyed by Navigator and Internet Explorer.

370. Microsoft's economic witness, Richard Schmalensee, testified that survey data collected by Market Decisions Corporation ("MDC") provide a more accurate measure of the usage shares enjoyed by different brands of Web browsing software than do AdKnowledge's hit data. The calculations that Schmalensee made using the MDC data lead to results that differ, in one main respect, from the results generated with hit data. Whereas the AdKnowledge data show Navigator's share falling from seventy-five to fifty-six percent from the first to the third quarter of 1997,

the MDC data show Navigator's share holding steady at fifty-five or fifty-six percent over the same period. Although both sources show Internet Explorer's share gaining steadily throughout that period, the MDC data indicate that Internet Explorer's rise was coming not at Navigator's expense, but rather at the expense of other browser products, which, according to the MDC data, collectively enjoyed a substantial share into 1997. The AdKnowledge data, by contrast, indicate that the share of usage attributable to browsers other than Internet Explorer and Navigator has never been substantial and that Internet Explorer's rise has always been at Navigator's expense.

371. The MDC estimates of the shares attributable to Navigator and other non-Microsoft browser products in 1996 differ markedly from those on which Microsoft and AOL relied in the course of making business judgments. Notably, in August 1996, four months after it commissioned the first MDC survey, Microsoft continued to estimate Navigator's share as exceeding eighty percent. In fact, the senior Microsoft executives who testified in this trial still believed at the time of their testimony that Navigator's usage share in late 1995 and early 1996 had exceeded eighty percent. To the extent the MDC estimates differ from those which Microsoft and AOL used internally, and which senior Microsoft executives still embrace, the Court is inclined to trust the latter estimates. More broadly, the sets of questions contained in the MDC surveys and the internally inconsistent responses they evoked reveal that a substantial percentage of the respondents misunderstood some of the patently ambiguous questions they were asked, and that a large number responded to questions when they were unsure of, or even clearly misinformed regarding, the answers. The Court accordingly gives no weight to any of the conclusions that Microsoft draws from MDC survey data.

372. In summary, the estimates on which Microsoft and AOL relied and the measurements made by

AdKnowledge and the University of Illinois provide an adequate basis for two findings: First, from early 1996 to the late summer of 1998, Navigator's share of all browser usage fell from above seventy percent to around fifty percent, while Internet Explorer's share rose from about five percent to around fifty percent; second, by 1998, Navigator's share of incremental browser usage had fallen below forty percent while Internet Explorer's share had risen above sixty percent. All signs point to the fact that Internet Explorer's share has continued to rise—and Navigator's has continued to decline—since the late summer of 1998. It is safe to conclude, then, that Internet Explorer's share of all browser usage now exceeds fifty percent, and that Navigator's share has fallen below that mark.

373. These trends will continue. In February 1998, Kumar Mehta, the Microsoft employee responsible for tracking browser share, told Brad Chase that Microsoft's best model projected that Internet Explorer's usage share in early 2001 would stand between sixty and sixty-eight percent. This comports with the forecast on which AOL relied in deciding to purchase Netscape: The report presented to AOL's board of directors prior to their vote on the transaction predicted that Navigator's usage share would fall to between thirty-five and forty percent by late 2000. The most reasonable prediction, then, is that by January 2001, Internet Explorer's usage share will exceed sixty percent while Navigator's share will have fallen below forty percent.

374. Navigator's large and continuing decline in usage share has demonstrated to developers the product's failure to mature as the standard software used to browse the Web. Internet Explorer's success in gaining usage share, together with the lack of contenders other than Navigator, has simultaneously sent the clear message to developers that no platform for network-centric applications can compete for ubiquity with the 32-bit Windows API set.

2. The Cause of the Change in Usage Shares

375. The changes in usage share described above would likely not have occurred had Microsoft not improved its browsing software to the point that, by late 1996, the average user could not discern a significant difference in quality and features between the latest versions of Internet Explorer and Navigator. As Microsoft's top executives predicted, however, Internet Explorer's quality and features have never surpassed Navigator's to such a degree as to compel a significant part of Navigator's installed base to switch to Internet Explorer. An internal Microsoft presentation concluded in February 1998 that "[m]any customers see MS and NS as parity products; no strong reason to switch," and another internal review three months later reported, "IE4 is fundamentally not compelling" and "[n]ot differentiated from Netscape v[ersion]4—seen as a commodity." For a time, even among new users, Navigator was likely to win most choices between comparable browser software, because most people associated the Internet and cutting-edge browsing technology with Netscape rather than with Microsoft. So, if Microsoft had taken no action other than improving the quality and features of its browser, Internet Explorer's share of usage would have risen far less and far more slowly than it actually did. While Internet Explorer's increase in usage share accelerated and began to cut deeply into Navigator's share after Microsoft released the first version of Internet Explorer (3.0) to offer quality and features approaching those of Navigator, the acceleration occurred months before Microsoft released the first version of Internet Explorer (4.0) to win a significant number of head-to-head product reviews against Navigator. This indicates that superior quality was not responsible for the dramatic rise Internet Explorer's usage share.

376. Including Internet Explorer with Windows at no additional charge likely helped the usage share of

Microsoft's browsing software. It did not, however, prevent OEMs from meeting demand for Navigator, which remained higher than demand for Internet Explorer well into 1998. Moreover, bundling Internet Explorer with Windows had no effect on the distribution and promotion of browsing software by IAPs or through any of the other channels that Microsoft sought to pre-empt by other means. Had Microsoft not offered distribution licenses for Internet Explorer—and other things of great value—to other firms at no charge; had it not prevented OEMs from removing the prominent means of accessing Internet Explorer and limited their ability to feature Navigator; and had Microsoft not taken all the other measures it used to maximize Internet Explorer's usage share at Navigator's expense, its browsing software would not have weaned such a large amount of usage share from Navigator, much less overtaken Navigator in three years.

I. The Success of Microsoft's Effort to Protect the Applications Barrier to Entry from the Threat Posed by Navigator

377. In late 1995 and early 1996, Navigator seemed well on its way to becoming the standard software for browsing the Web. Within three years, however, Microsoft had successfully denied Navigator that status, and had thereby forestalled a serious potential threat to the applications barrier to entry. Indeed, Microsoft's Kumar Mehta felt comfortable expressing to Brad Chase in February 1998 his "PERSONAL opinion" that "the browser battle is close to over." Mehta continued: "We set out on this mission 2 years ago to not let netscape dictate standards and control the browser api's [sic]. All evidence today says they don't."

378. The population of browser users is expanding so quickly that Navigator's installed base has grown even as its usage share has fallen. In fact, AOL credited an estimate stating that Navigator's installed base in the United States alone grew from fifteen million in 1996 to thirty-three million in December 1998. By all indications, Navigator's

installed base will continue to grow. This does not mean, however, that Navigator is—or will be—an attractive enough platform for the development of network-centric applications to weaken the applications barrier to entry. As discussed above, the APIs that Navigator exposes could only attract enough developer attention to threaten the applications barrier to entry if Navigator became—or appeared destined to become—the standard software used to browse the Web. Navigator's installed base may continue to grow, but Internet Explorer's installed base is now larger and growing faster. Consequently, the APIs that Navigator exposes will not attract enough developer attention to spawn a body of cross-platform, network-centric applications large enough to dismantle the applications barrier to entry.

379. Not only did Microsoft prevent Navigator from undermining the applications barrier to entry, it inflicted considerable harm on Netscape's business in the process. By ensuring that the firms comprising the channels that lead most efficiently to browser usage distributed and promoted Internet Explorer to the virtual exclusion of Navigator, Microsoft relegated Netscape to more costly and less effective methods of distributing and promoting its browsing software. After Microsoft started licensing Internet Explorer at no charge, not only to OEMs and consumers, but also to IAPs, ISVs, ICPs, and even Apple, Netscape was forced to follow suit. Despite the fact that it did not charge for Internet Explorer, Microsoft could still defray the massive costs it was undertaking to maximize usage share with the vast profits earned licensing Windows. Because Netscape did not have that luxury, it could ill afford the dramatic drop in revenues from Navigator, much less to pay for the inefficient modes of distribution to which Microsoft had consigned it. The financial constraints also deterred Netscape from undertaking technical innovations that it might otherwise have implemented in Navigator. Microsoft was not altogether surprised, then, when it learned in November 1998

that Netscape had surrendered itself to acquisition by another company.

380. Were AOL ever to attempt to revive Navigator's usage share with the intention of building it into a significant platform for the development of network-centric applications, that effort would not make any headway before January 1, 2001, when AOL's obligation to distribute Internet Explorer on a preferential basis expires. In fact, there is presently no indication that AOL will try even after that date to raise Navigator's usage share substantially. First of all, as explained above, AOL need not revive Navigator's usage share in order to achieve an adequate return on its investment in Netscape. Secondly, while the due-diligence summary and board-of-directors presentation that preceded the Netscape acquisition discuss AOL's commitment to invest marketing resources in an effort to stem the slide in Navigator's share, neither report indicates any intention on AOL's part to invest in actually raising Navigator's share.

381. Also detracting from the notion that AOL is committed to reviving the middleware threat through Navigator is the fact that AOL included in the November 1998 agreement with Sun a provision making clear that the new partnership with Sun in no way obligated AOL to drop Internet Explorer from its client software in favor of Navigator. The provision states that "AOL has no present intention to make any such replacement or use and shall have no obligation to make any such replacement or use, and that it is AOL's present expectation that it . . . may seek to renew and/or extend and expand its present agreement with Microsoft Corporation to continue to distribute Internet Explorer."

382. Bill Gates himself, who is not one to underestimate threats to Microsoft's business, apparently concluded after reviewing the November 1998 transactions that AOL would not seek to develop a platform that would compete with Microsoft's network-centric interfaces. In

December 1998, during a meeting convened to analyze the implications of the AOL/Netscape/Sun transactions, Gates declared to the assembled Microsoft executives, "AOL doesn't have it in their genes to attack us in the platform space."

383. Finally, if its coveted placement in the Online Services Folder fails to entice AOL into extending its agreement with Microsoft past January 2001, Microsoft assuredly has the wherewithal to offer AOL additional inducements in exchange for yet more commitments that will preclude a resurgence of Navigator's usage share. Even if, despite the absence of signs to that effect, AOL drops Internet Explorer and adopts Navigator with a mind to reviving Navigator's usage share after January 1, 2001, Navigator's transformation into a platform attractive enough to threaten the applications barrier would be a chimerical aspiration, especially considering Microsoft's increasing influence over network-centric standards. In any event, nothing that happens after January 1, 2001 will change the fact that Microsoft has succeeded in forestalling for several years Navigator's evolution in that direction.

384. Although the suspicion lingers, the evidence is insufficient to find that Microsoft's ambition is a future in which most or all of the content available on the Web would be accessible only through its own browsing software. The evidence does, however, reveal an intent to ensure that if and when full-featured, server-based applications begin appearing in large numbers on the Web, the number of them relying solely on middleware APIs (such as those exposed by Navigator) will be too few to attenuate the applications barrier to entry.

385. At least partly because of Navigator's substantial usage share, most developers continue to insist that their Web content be more-or-less as attractive when accessed with Navigator as it is when accessed with Internet Explorer. Navigator will retain an appreciable usage share through the

end of 2000. After that point, AOL may be able and willing to prevent Internet Explorer's share from achieving such dominance that a critical mass of developers will cease to concern themselves with ensuring that their Web content at least be accessible through non-Microsoft browsing software. So, as matters stand at present, while Microsoft has succeeded in forestalling the development of enough full-featured, cross-platform, network-centric applications to render the applications barrier penetrable, it is not likely to drive non-Microsoft PC Web browsing software from the marketplace altogether.

VI. MICROSOFT'S RESPONSE TO THE THREAT POSED BY SUN'S IMPLEMENTATION OF JAVA

386. For Microsoft, a key to maintaining and reinforcing the applications barrier to entry has been preserving the difficulty of porting applications from Windows to other platforms, and vice versa. In 1996, senior executives at Microsoft became aware that the number of developers writing network-centric applications in the Java programming language had become significant, and that Java was likely to increase in popularity among developers. Microsoft therefore became interested in maximizing the difficulty with which applications written in Java could be ported from Windows to other platforms, and vice versa.

A. Creating a Java Implementation for Windows that Undermined Portability and Was Incompatible with Other Implementations

387. Although Sun intended Java technologies eventually to allow developers to write applications that would run on multiple operating systems without any porting, the Java class libraries have never exposed enough APIs to support full-featured applications. Java developers have thus always needed to rely on platform-specific APIs in

order to write applications with advanced functionality. Recognizing this, Sun sponsored a process for the creation of a software method that would allow developers writing in Java to rely directly upon APIs exposed by a particular operating system in a way that would nevertheless allow them to port their applications with relative ease to JVMs running on different operating systems.

388. On March 12, 1996, Sun signed an agreement granting Microsoft the right to distribute and make certain modifications to Sun's Java technologies. Microsoft used this license to create its own Java development tools and its own Windows-compatible Java runtime environment. Because the motivation behind the Sun-sponsored effort ran counter to Microsoft's interest in preserving the difficulty of porting, Microsoft independently developed methods for enabling "calls" to "native" Windows code that made porting more difficult than the method that Sun was striving to make standard. Microsoft implemented these different methods in its developer tools and in its JVM. Microsoft also discouraged its business allies from aiding Sun's effort. For example, Gates told Intel's CEO in June 1996 that he did not want the Intel Architecture Labs cooperating with Sun to develop methods for calling upon multimedia interfaces in Windows.

389. Since they were custom-built for enabling native calls to Windows, and because they were developed by the firm with the most intimate knowledge of Windows, the native methods that Microsoft produced were slightly easier for developers to use than the method that derived from the Sun-sponsored effort, and Java applications using Microsoft's methods tended to run faster than ones calling upon Windows APIs with Sun's method. If a developer relied on Microsoft's methods rather than Sun's, however, his Java application would be much more difficult to port from the Windows-compatible JVM to JVMs designed to run on different operating systems.

390. Microsoft easily could have implemented Sun's native method along with its own in its developer tools and its JVM, thereby allowing Java developers to choose between speed and portability; however, it elected instead to implement only the Microsoft methods. The result was that if a Java developer used the Sun method for making native calls, his application would not run on Microsoft's version of the Windows JVM, and if he used Microsoft's native methods, his application would not run on any JVM other than Microsoft's version. Far from being the unintended consequence of an attempt to help Java developers more easily develop high-performing applications, incompatibility was the intended result of Microsoft's efforts. In fact, Microsoft would subsequently threaten to use the same tactic against Apple's QuickTime. Microsoft continued to refuse to implement Sun's native method until November 1998, when a court ordered it to do so. It then took Microsoft only a few weeks to implement Sun's native method in its developer tools and JVM.

391. Although the Java class libraries have yet to provide enough functionality to support full-featured applications, they have gradually expanded toward that goal. In 1997, Sun added a class library called Remote Method Invocation, or "RMI," which allowed Java applications written to call upon it to communicate with each other in certain useful ways. Microsoft was not willing to stand by and allow Java developers to rely on new Java class libraries unimpeded. The more that Java developers were able to satisfy their need for functionality by calling upon the Java class libraries, the more portable their applications would become. Microsoft had developed a set of Windows-specific interfaces to provide functionality analogous to the functionality RMI offered; it wanted Java developers to rely on this Windows-specific technology rather than Sun's cross-platform interface. Microsoft thus refused to include RMI as a standard component of the Java runtime

environment for Windows that it shipped with Internet Explorer 4.0.

392. The license agreement it had signed with Sun the previous year obligated Microsoft to offer RMI, at a minimum, on its developer Web site. Microsoft did so, but with respect to the RMI beta release, it buried the link in an obscure location and neglected to include an entry for it in the site's index. Referring to RMI and any Java developers who might access Microsoft's site looking for it, a Microsoft employee wrote to his approving manager, "They'll have to stumble across it to know it's there. . . . I'd say it's pretty buried."

393. It is unclear whether Microsoft ultimately placed RMI in a more prominent place on its developer Web site. Even if it did, the fact that RMI was not shipped with Microsoft's Java runtime environment for Windows meant that Java developers could not rely on its being installed on consumers' PC systems. If developers wanted their Java applications to call upon communications interfaces guaranteed to be present on Windows users' systems, they had no choice but to rely on the Microsoft-specific interfaces instead of RMI. Microsoft undertook the effort to remove RMI from the rest of the Java class libraries, instead of simply leaving it in place and allowing developers to choose between it and Windows-specific interfaces, for the sole purpose of making it more difficult for Java developers to write easily portable applications.

394. In a further effort intended to increase the incompatibility between Java applications written for its Windows JVM and other Windows JVMs, and to increase the difficulty of porting Java applications from the Windows environment to other platforms, Microsoft designed its Java developer tools to encourage developers to write their Java applications using certain "keywords" and "compiler directives" that could only be executed properly by Microsoft's version of the Java runtime environment for

Windows. Microsoft encouraged developers to use these extensions by shipping its developer tools with the extensions enabled by default and by failing to warn developers that their use would result in applications that might not run properly with any runtime environment other than Microsoft's and that would be difficult, and perhaps impossible, to port to JVMs running on other platforms. This action comported with the suggestion that Microsoft's Thomas Reardon made to his colleagues in November 1996: "[W]e should just quietly grow j++ [Microsoft's developer tools] share and assume that people will take more advantage of our classes without ever realizing they are building win32-only java apps." Microsoft refused to alter its developer tools until November 1998, when a court ordered it to disable its keywords and compiler directives by default and to warn developers that using Microsoft's Java extensions would likely cause incompatibilities with non-Microsoft runtime environments.

B. Inducing Developers to Use the Microsoft Implementation of Java Rather than Sun-Compliant Implementations

395. If all Microsoft had done to combat the growth of easily portable Java applications had been to increase the incompatibility between its Java implementation and ones complying with Sun's standards, the effect might have been limited. For if Sun could have assured developers that a Windows-compatible Java runtime environment that complied with Sun's standards would be installed on as many Windows PCs as Microsoft's version, and that it would run Java applications as well as Microsoft's, developers might have considered the cost in portability associated with relying on Microsoft-specific technologies and instead written their Java applications using Sun's developer tools. When Netscape announced in May 1995 that it would include with every copy of Navigator a copy of a Windows JVM that complied with Sun's standards, it

appeared that Sun's Java implementation would achieve the necessary ubiquity on Windows.

396. Determined to induce developers to write Java applications that relied on its version of the runtime environment for Windows rather than on Sun-compliant ones, Microsoft made a large investment of engineering resources to develop a high-performance Windows JVM. This made Microsoft's version of the runtime environment attractive on its technical merits. To hinder Sun and Netscape from improving the quality of the Windows JVM shipped with Navigator, Microsoft pressured Intel, which was developing a high-performance Windows-compatible JVM, to not share its work with either Sun or Netscape, much less allow Netscape to bundle the Intel JVM with Navigator. Gates was himself involved in this effort. During the August 2, 1995 meeting at which he urged Intel to halt IAL's development of platform-level software, Gates also announced that Intel's cooperation with Sun and Netscape to develop a Java runtime environment for systems running on Intel's microprocessors was one of the issues threatening to undermine cooperation between Intel and Microsoft. By the spring of 1996, Intel had developed a JVM designed to run well on Intel-based systems while complying with Sun's cross-platform standards. Microsoft executives approached Intel in April of that year and urged that Intel not take any steps toward allowing Netscape to ship this JVM with Navigator.

397. By bundling its version of the Windows JVM with every copy of Internet Explorer and expending some of its surplus monopoly power to maximize the usage of Internet Explorer at Navigator's expense, Microsoft endowed its Java runtime environment with the unique attribute of guaranteed, enduring ubiquity across the enormous Windows installed base. As one internal Microsoft presentation from January 1997 put it, the company's response to cross-platform Java entailed "[i]ncreased IE share—integrat[ion]

with Windows." Partly as a result of the damage that Microsoft's efforts against Navigator inflicted on Netscape's business, Netscape decided in 1998 that it could no longer afford to do the engineering work necessary to continue bundling up-to-date JVMs with Navigator. Consequently, it announced that, starting with version 5.0, Navigator would cease to be a distribution vehicle for JVMs compliant with Sun's standards.

398. The guaranteed presence of Microsoft's runtime environment on every Windows PC and the decreasing likelihood that the primary host of the Sun-compliant runtime environment (Navigator) would be present induced many Java developers to write their applications using Microsoft's developer tools, for doing so guaranteed that those applications would run in the Java environment most likely to be installed on a Windows user's PC. Owing to Microsoft's deliberate design decisions, more developers using Microsoft's Java developer tools meant that more Java applications would rely on the Windows-specific technologies in Microsoft's runtime environment and thus would not be portable.

399. Microsoft was not content to rely solely on its anti-Navigator efforts to ensure that its Java runtime environment would be the only one guaranteed to be present on Windows PC systems. After all, Netscape was not the only ISV capable of placing copies of a runtime environment on users' systems. Many developers of network-centric applications were just as capable of bundling compatible runtime environments with their applications as they were of bundling browsing software. If the right runtime environment already came bundled with the right browsing software, all the more convenient for the ISV. If not (as would increasingly be the case after Netscape stopped bundling a runtime environment with Navigator), though, the ISV could still separately obtain the desired runtime environment and bundle it with every copy of its product.

400. Recognizing ISVs as a channel through which Java runtime environments that complied with Sun's standards could find their way onto Windows PC systems, Microsoft induced ISVs to distribute Microsoft's version instead of a Sun-compliant one. First, Microsoft made its JVM available to ISVs separately from Internet Explorer so that those uninterested in bundling browsing software could nevertheless bundle Microsoft's JVM. Microsoft's David Cole revealed the motivation for this step in a message he wrote to Jim Allchin in July 1997: "[W]e've agreed that we must allow ISVs to redistribute the Java VM standalone, without IE. ISVs that do this are bound into Windows because that's the only place the VM works, and it keeps them away from Sun's APIs."

401. Microsoft took the further step of offering valuable things to ISVs that agreed to use Microsoft's Java implementation. Specifically, in the First Wave agreements that it signed with dozens of ISVs in 1997 and 1998, Microsoft conditioned early Windows 98 and Windows NT betas, other technical information, and the right to use certain Microsoft seals of approval on the agreement of those ISVs to use Microsoft's version of the Windows JVM as the "default." Microsoft and the ISVs all read this requirement to obligate the ISVs to ensure that their Java applications were compatible with Microsoft's version of the Windows JVM. The only effective way to ensure compatibility with Microsoft's JVM was to use Microsoft's Java developer tools, which in turn meant using Microsoft's methods for making native calls and (unless the developers were especially wary and sophisticated) Microsoft's other Java extensions. Thus, a very large percentage of the Java applications that the First Wave ISVs wrote would run only on Microsoft's version of the Windows JVM. With that in mind, the First Wave ISVs would not have any reason to distribute with their Java applications any JVM other than Microsoft's. So, in exchange for costly technical support and other blandishments, Microsoft induced dozens of important

ISVs to make their Java applications reliant on Windows-specific technologies and to refrain from distributing to Windows users JVMs that complied with Sun's standards. The record contains no evidence that the relevant provision in the First Wave agreements had any purpose other than to maximize the difficulty of porting Java applications between Windows and other platforms. Microsoft remained free to hold the First Wave ISVs to this provision until a court enjoined its enforcement in November 1998.

402. In addition to the First Wave agreements, Microsoft entered an agreement with at least one ISV that explicitly required it to redistribute Microsoft's JVM to the exclusion of any other and to rely upon Microsoft's native methods to the exclusion of any other methods. Such agreements were also prohibited by the November 1998 injunction.

403. Microsoft anticipated that the Java language would become a popular medium in the multimedia arena. It thus wanted to ensure that the Java software created to deliver multimedia content would not rely on Java implementations that fostered portability. RealNetworks developed the most popular software for the creation and play-back of streaming multimedia content. Therefore, Microsoft sought to ensure that, to the extent Java developers relied on RealNetworks' technologies, they would not be relying on a Java implementation that complied with Sun's standards. So, in the July 18, 1997 agreement that it entered with RealNetworks, Microsoft conditioned its agreement to distribute RealNetworks' media player with Internet Explorer on RealNetworks' agreement to exert its best efforts to ensure that its player primarily use Windows-specific technology, rather than any analogous interfaces that Sun or Netscape might develop, to display multimedia content. Absent this obligation, there would have been no technical reason why RealNetworks could not have designed its media player to support both Microsoft's technologies

and ones developed by Sun or Netscape. Although RealNetworks subsequently announced that it planned to continue developing its own fundamental streaming software, the July 18 agreement limited the extent to which that software would include Java technologies that complied with Sun's standards.

C. Thwarting the Expansion of the Java Class Libraries

404. As discussed above, Microsoft's effort to lock developers into its Windows-specific Java implementation included actions designed to discourage developers from taking advantage of Java class libraries such as RMI. Microsoft went further than that, however. In pursuit of its goal of minimizing the portability of Java applications, Microsoft took steps to thwart the very creation of cross-platform Java interfaces. The incorporation of greater functionality into the Java class libraries would have increased the portability of the applications that relied on them, while simultaneously encouraging developers to use Sun-compliant implementations of Java. In one instance of this effort to stunt the growth of the Java class libraries, Microsoft used threats to withhold Windows operating-system support from Intel's microprocessors and offers to include Intel technology in Windows in order to induce Intel to stop aiding Sun in the development of Java classes that would support innovative multimedia functionality.

405. In November 1995, Microsoft's Paul Maritz told a senior Intel executive that Intel's optimization of its multimedia software for Sun's Java standards was as inimical to Microsoft as Microsoft's support for non-Intel microprocessors would be to Intel. It was not until 1997, though, that Microsoft prevailed upon Intel to not support Sun's development of Java classes that would have allowed developers to include certain multimedia features in their Java applications without sacrificing portability.

406. In February 1997, one of Intel's competitors, called AMD, solicited support from Microsoft for its "3DX" technology, which provided sophisticated multimedia support for games. Microsoft's Allchin asked Gates whether Microsoft should support 3DX, despite the fact that Intel would oppose it. Gates responded: "If Intel has a real problem with us supporting this then they will have to stop supporting Java Multimedia the way they are. I would gladly give up supporting this if they would back off from their work on JAVA which is terrible for Intel." Near the end of March, Allchin sent another message to Gates and Maritz. In it he wrote, "I am positive that we must do a direct attack on Sun (and probably Oracle). . . . Between ourselves and our partners, we can certainly hurt their (certainly Sun's) revenue base. . . . We need to get Intel to help us. Today, they are not." Two months later, Eric Engstrom, a Microsoft executive with responsibility for multimedia development, wrote to his superiors that one of Microsoft's goals was getting "Intel to stop helping Sun create Java Multimedia APIs, especially ones that run well (ie native implementations) on Windows." Engstrom proposed achieving this goal by offering Intel the following deal: Microsoft would incorporate into the Windows API set any multimedia interfaces that Intel agreed to not help Sun incorporate into the Java class libraries. Engstrom's efforts apparently bore fruit, for he testified at trial that Intel's IAL subsequently stopped helping Sun to develop class libraries that offered cutting-edge multimedia support.

D. The Effect of Microsoft's Efforts to Prevent Java from Diminishing the Applications Barrier to Entry

407. Had Microsoft not been committed to protecting and enhancing the applications barrier to entry, it might still have developed a high-performance JVM and enabled Java developers to call upon Windows APIs. Absent this commitment, though, Microsoft would not have taken efforts

to maximize the difficulty of porting Java applications written to its implementation and to drastically limit the ability of developers to write Java applications that would run in both Microsoft's version of the Windows runtime environment and versions complying with Sun's standards. Nor would Microsoft have endeavored to limit Navigator's usage share, to induce ISVs to neither use nor distribute non-Microsoft Java technologies, and to impede the expansion of the Java class libraries, had it not been determined to discourage developers from writing applications that would be easy to port between Windows and other platforms. Microsoft's dedication to the goal of protecting the applications barrier to entry is highlighted by the fact that its efforts to create incompatibility between its JVM and others resulted in fewer applications being able to run on Windows than otherwise would have. Microsoft felt it was worth obstructing the development of Windows-compatible applications where those applications would have been easy to port to other platforms. It is not clear whether, absent Microsoft's interference, Sun's Java efforts would by now have facilitated porting between Windows and other platforms enough to weaken the applications barrier to entry. What is clear, however, is that Microsoft has succeeded in greatly impeding Java's progress to that end with a series of actions whose sole purpose and effect were to do precisely that.

VII. THE EFFECT ON CONSUMERS OF MICROSOFT'S EFFORTS TO PROTECT THE APPLICATIONS BARRIER TO ENTRY

408. The debut of Internet Explorer and its rapid improvement gave Netscape an incentive to improve Navigator's quality at a competitive rate. The inclusion of Internet Explorer with Windows at no separate charge increased general familiarity with the Internet and reduced the cost to the public of gaining access to it, at least in part because it compelled Netscape to stop charging for

Navigator. These actions thus contributed to improving the quality of Web browsing software, lowering its cost, and increasing its availability, thereby benefitting consumers.

409. To the detriment of consumers, however, Microsoft has done much more than develop innovative browsing software of commendable quality and offer it bundled with Windows at no additional charge. As has been shown, Microsoft also engaged in a concerted series of actions designed to protect the applications barrier to entry, and hence its monopoly power, from a variety of middleware threats, including Netscape's Web browser and Sun's implementation of Java. Many of these actions have harmed consumers in ways that are immediate and easily discernible. They have also caused less direct, but nevertheless serious and far-reaching, consumer harm by distorting competition.

410. By refusing to offer those OEMs who requested it a version of Windows without Web browsing software, and by preventing OEMs from removing Internet Explorer—or even the most obvious means of invoking it—prior to shipment, Microsoft forced OEMs to ignore consumer demand for a browserless version of Windows. The same actions forced OEMs either to ignore consumer preferences for Navigator or to give them a Hobson's choice of both browser products at the cost of increased confusion, degraded system performance, and restricted memory. By ensuring that Internet Explorer would launch in certain circumstances in Windows 98 even if Navigator were set as the default, and even if the consumer had removed all conspicuous means of invoking Internet Explorer, Microsoft created confusion and frustration for consumers, and increased technical support costs for business customers. Those Windows purchasers who did not want browsing software—businesses, or parents and teachers, for example, concerned with the potential for irresponsible Web browsing on PC systems—not only had to undertake the effort necessary to remove the visible means of invoking Internet

Explorer and then contend with the fact that Internet Explorer would nevertheless launch in certain cases; they also had to (assuming they needed new, non-browsing features not available in earlier versions of Windows) content themselves with a PC system that ran slower and provided less available memory than if the newest version of Windows came without browsing software. By constraining the freedom of OEMs to implement certain software programs in the Windows boot sequence, Microsoft foreclosed an opportunity for OEMs to make Windows PC systems less confusing and more user-friendly, as consumers desired. By taking the actions listed above, and by enticing firms into exclusivity arrangements with valuable inducements that only Microsoft could offer and that the firms reasonably believed they could not do without, Microsoft forced those consumers who otherwise would have elected Navigator as their browser to either pay a substantial price (in the forms of downloading, installation, confusion, degraded system performance, and diminished memory capacity) or content themselves with Internet Explorer. Finally, by pressuring Intel to drop the development of platform-level NSP software, and otherwise to cut back on its software development efforts, Microsoft deprived consumers of software innovation that they very well may have found valuable, had the innovation been allowed to reach the marketplace. None of these actions had pro-competitive justifications.

411. Many of the tactics that Microsoft has employed have also harmed consumers indirectly by unjustifiably distorting competition. The actions that Microsoft took against Navigator hobbled a form of innovation that had shown the potential to depress the applications barrier to entry sufficiently to enable other firms to compete effectively against Microsoft in the market for Intel-compatible PC operating systems. That competition would have conduced to consumer choice and nurtured innovation. The campaign against Navigator also retarded widespread

acceptance of Sun's Java implementation. This campaign, together with actions that Microsoft took with the sole purpose of making it difficult for developers to write Java applications with technologies that would allow them to be ported between Windows and other platforms, impeded another form of innovation that bore the potential to diminish the applications barrier to entry. There is insufficient evidence to find that, absent Microsoft's actions, Navigator and Java already would have ignited genuine competition in the market for Intel-compatible PC operating systems. It is clear, however, that Microsoft has retarded, and perhaps altogether extinguished, the process by which these two middleware technologies could have facilitated the introduction of competition into an important market.

412. Most harmful of all is the message that Microsoft's actions have conveyed to every enterprise with the potential to innovate in the computer industry. Through its conduct toward Netscape, IBM, Compaq, Intel, and others, Microsoft has demonstrated that it will use its prodigious market power and immense profits to harm any firm that insists on pursuing initiatives that could intensify competition against one of Microsoft's core products. Microsoft's past success in hurting such companies and stifling innovation deters investment in technologies and businesses that exhibit the potential to threaten Microsoft. The ultimate result is that some innovations that would truly benefit consumers never occur for the sole reason that they do not coincide with Microsoft's self-interest.

/s/
Thomas Penfield Jackson
U.S. District Judge

Date: November 5, 1999

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. MICROSOFT CORPORATION, Defendant.	Civil Action No. 98-1232 (TPJ)
STATE OF NEW YORK, *et al.*, Plaintiffs, v. MICROSOFT CORPORATION, Defendant.	Filed Jun 07 2000 Nancy Mayer-Whittington, Clerk U.S. District Court Civil Action No. 98-1233 (TPJ)
MICROSOFT CORPORATION, Counterclaim-Plaintiff, v. ELIOT SPITZER, attorney general of the State of New York, in his official capacity, *et al.*, Counterclaim-Defendants.	

MEMORANDUM AND ORDER

These cases are before the Court for disposition of the sole matter presently remaining for decision by the trial court, namely, entry of appropriate relief for the violations of the Sherman Act, §§ 1 and 2, and various state laws committed by the defendant Microsoft Corporation as found by Court in accordance with its Findings of Fact and Conclusions of Law. Final judgment will be entered contemporaneously herewith. No further proceedings will be required.

The Court has been presented by plaintiffs with a proposed form of final judgment that would mandate both conduct modification and structural reorganization by the defendant when fully implemented. Microsoft has responded with a motion for summary rejection of structural reorganization and a request for months of additional time to oppose the relief sought in all other respects. Microsoft claims, in effect, to have been surprised by the "draconian" and "unprecedented" remedy the plaintiffs recommend. What it proposes is yet another round of discovery, to be followed by a second trial—in essence an *ex post* and *de facto* bifurcation of the case already considered and rejected by the Court.

Microsoft's profession of surprise is not credible.[1] From the inception of this case Microsoft knew, from well-established Supreme Court precedents dating from the beginning of the last century, that a mandated divestiture was a possibility, if not a probability, in the event of an adverse result at trial. At the conclusion of the trial the Court's Findings of Fact gave clear warning to Microsoft that the result would likely be adverse, yet the Court delayed entry of its Conclusions of Law for five months, and enlisted the services of a distinguished mediator, to assist Microsoft and the plaintiffs in reaching agreement on a remedy of some description that Microsoft knew was inevitable. Even assuming that Microsoft negotiated in utmost good faith in the course of mediation, it had to have in contemplation the prospect that, were mediation to fail, the prevailing plaintiffs would propose to the Court a remedy most to their liking and least likely to be acceptable to Microsoft. Its failure to

[1] Despite their surprise, compounded no doubt by the Court's refusal on May 24th to allow discovery and take testimony on the issue, Microsoft's attorneys were promptly able to tender a 35-page "Offer of Proof," summarizing in detail the testimony 16 witnesses would give to explain why plaintiffs' proposed remedy, in its entirety, is a bad idea. Within a week they added seven more.

anticipate and to prepare to meet such an eventuality gives no reason to afford it an opportunity to do so now.

These cases have been before the Court, and have occupied much of its attention, for the past two years, not counting the antecedent proceedings. Following a full trial Microsoft has been found guilty of antitrust violations, notwithstanding its protests to this day that it has committed none. The Court is convinced for several reasons that a final—and appealable—judgment should be entered quickly. It has also reluctantly come to the conclusion, for the same reasons, that a structural remedy has become imperative: Microsoft as it is presently organized and led is unwilling to accept the notion that it broke the law or accede to an order amending its conduct.

First, despite the Court's Findings of Fact and Conclusions of Law, Microsoft does not yet concede that any of its business practices violated the Sherman Act. Microsoft officials have recently been quoted publicly to the effect that the company has "done nothing wrong" and that it will be vindicated on appeal. The Court is well aware that there is a substantial body of public opinion, some of it rational, that holds to a similar view. It is time to put that assertion to the test. If true, then an appellate tribunal should be given early opportunity to confirm it as promptly as possible, and to abort any remedial measures before they have become irreversible as a practical matter.

Second, there is credible evidence in the record to suggest that Microsoft, convinced of its innocence, continues to do business as it has in the past, and may yet do to other markets what it has already done in the PC operating system and browser markets. Microsoft has shown no disposition to voluntarily alter its business protocol in any significant respect. Indeed, it has announced its intention to appeal even the imposition of the modest conduct remedies it has itself proposed as an alternative to the non-structural remedies sought by the plaintiffs.

Third, Microsoft has proved untrustworthy in the past. In earlier proceedings in which a preliminary injunction was entered, Microsoft's purported compliance with that injunction while it was on appeal was illusory and its explanation disingenuous. If it responds in similar fashion to an injunctive remedy in this case, the earlier the need for enforcement measures becomes apparent the more effective they are likely to be.

Finally, the Court believes that extended proceedings on the form a remedy should take are unlikely to give any significantly greater assurance that it will be able to identify what might be generally regarded as an optimum remedy. As has been the case with regard to Microsoft's culpability, opinion as to an appropriate remedy is sharply divided. There is little chance that those divergent opinions will be reconciled by anything short of actual experience. The declarations (and the "offers of proof") from numerous potential witnesses now before the Court provide some insight as to how its various provisions might operate, but for the most part they are merely the predictions of purportedly knowledgeable people as to effects which may or may not ensue if the proposed final judgment is entered. In its experience the Court has found testimonial predictions of future events generally less reliable even than testimony as to historical fact, and cross-examination to be of little use in enhancing or detracting from their accuracy.

In addition to its substantive objections, the proposed final judgment is also criticized by Microsoft as being vague and ambiguous. Plaintiffs respond that, to the extent it may be lacking in detail, it is purposely so to allow Microsoft itself to propose such detail as will be least disruptive of its business, failing which plaintiffs will ask the Court to supply it as the need appears.

Plaintiffs won the case, and for that reason alone have some entitlement to a remedy of their choice. Moreover, plaintiffs' proposed final judgment is the collective work

product of senior antitrust law enforcement officials of the United States Department of Justice and the Attorneys General of 19 states, in conjunction with multiple consultants.[2] These officials are by reason of office obliged and expected to consider—and to act in—the public interest; Microsoft is not. The proposed final judgment is represented to the Court as incorporating provisions employed successfully in the past, and it appears to the Court to address all the principal objectives of relief in such cases, namely, to terminate the unlawful conduct, to prevent its repetition in the future, and to revive competition in the relevant markets. Microsoft's alternative decree is plainly inadequate in all three respects.

The final judgment proposed by plaintiffs is perhaps more radical than might have resulted had mediation been successful and terminated in a consent decree. It is less so than that advocated by four disinterested *amici curiae*. It is designed, moreover, to take force in stages, so that the effects can be gauged while the appeal progresses and before it has been fully implemented. And, of course, the Court will retain jurisdiction following appeal, and can modify the judgment as necessary in accordance with instructions from an appellate court or to accommodate conditions changed with the passage of time.

It is, therefore, this 7th day of June, 2000,

ORDERED, that the motion of defendant Microsoft Corporation for summary rejection of the plaintiffs' proposed structural reorganization is denied; and it is

FURTHER ORDERED, that defendant Microsoft Corporation's "position" as to future proceedings on the issue of remedy is rejected; and it is

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[2] Two states dissented from the imposition of structural remedies but fully supported the remainder of the relief proposed. The absence of total unanimity merely confirms the collaborative character of the process by which the proposed final judgment was formulated.

FURTHER ORDERED, that plaintiffs' proposed final judgment, as revised in accordance with the proceedings of May 24, 2000 and Microsoft's comments thereon, be entered as a Final Judgment herein.

/s/
Thomas Penfield Jackson
U.S. District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. MICROSOFT CORPORATION, Defendant.	Civil Action No. 98-1232 (TPJ)
STATE OF NEW YORK, *et al.*, Plaintiffs, v. MICROSOFT CORPORATION, Defendant.	Filed Jun 07 2000 Nancy Mayer-Whittington, Clerk U.S. District Court Civil Action No. 98-1233 (TPJ)
MICROSOFT CORPORATION, Counterclaim-Plaintiff, v. ELIOT SPITZER, attorney general of the State of New York, in his official capacity, *et al.*, Counterclaim-Defendants.	

FINAL JUDGMENT

Plaintiff, United States of America, having filed its complaint herein on May 18, 1998;

Plaintiff States, having filed their complaint herein on the same day;

Defendant Microsoft Corporation ("Microsoft") having appeared and filed its answer to such complaints;

The Court having jurisdiction of the parties hereto and of the subject matter hereof and having conducted a trial

thereon and entered Findings of Fact on November 5, 1999, and Conclusions of Law on April 3, 2000;

The Court having entered judgment in accordance with the Findings of Fact and the Conclusions of Law on April 3, 2000, that Microsoft has violated §§ 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, as well as the following state law provisions: Cal. Bus. & Prof. Code §§ 16720, 16726, 16727, 17200; Conn. Gen. Stat. §§ 35-26, 35-27, 35-29; D.C. Code §§ 28-4502, 28-4503; Fla. Stat. chs. 501.204(1), 542.18, 542.19; 740 Ill. Comp. Stat. ch. 10/3; Iowa Code §§ 553.4, 553.5; Kan. Stat. §§ 50-101 *et seq.*; Ky. Rev. Stat. §§ 367.170, 367.175; La. Rev. Stat. §§ 51:122, 51:123, 51:1405; Md. Com. Law II Code Ann. § 11-204; Mass. Gen. Laws ch. 93A, § 2; Mich. Comp. Laws §§ 445.772, 445.773; Minn. Stat. § 325D.52; N.M. Stat. §§ 57-1-1, 57-1-2; N.Y. Gen. Bus. Law § 340; N.C. Gen. Stat. §§ 75-1.1, 75-2.1; Ohio Rev. Code §§ 1331.01, 1331.02; Utah Code § 76-10-914; W.Va. Code §§ 47-18-3, 47-18-4; Wis. Stat. § 133.03(1)-(2); and

Upon the record at trial and all prior and subsequent proceedings herein, it is this 7th day of June, 2000, hereby:

ORDERED, ADJUDGED, AND DECREED as follows:

1. Divestiture

   a. Not later than four months after entry of this Final Judgment, Microsoft shall submit to the Court and the Plaintiffs a proposed plan of divestiture. The Plaintiffs shall submit any objections to the proposed plan of divestiture to the Court within 60 days of receipt of the plan, and Microsoft shall submit its response within 30 days of receipt of the plaintiffs' objections.

   b. Following approval of a final plan of divestiture by the Court (the "Plan")[1] (and the expiration of the stay pending appeal set forth in section 6.a), Microsoft shall implement such Plan.

   c. The Plan shall provide for the completion, within 12 months of the expiration of the stay pending appeal set forth in section 6.a., of the following steps:

      i. The separation of the Operating Systems Business from the Applications Business, and the transfer of the assets of one of them (the "Separated Business") to a separate entity along with (a) all personnel, systems, and other tangible and intangible assets (including Intellectual Property) used to develop, produce, distribute, market, promote, sell, license and support the products and services of the Separated Business, and (b) such other assets as are necessary to operate the Separated Business as an independent and economically viable entity.

      ii. Intellectual Property that is used both in a product developed, distributed, or sold by the Applications Business and in a product developed, distributed, or sold by the Operating Systems Business as of April 27, 2000, shall be assigned to the Applications Business, and the Operating Systems Business shall be granted a perpetual, royalty-free license to license and distribute such Intellectual Property in its products, and, except with respect to such Intellectual Property related to the Internet browser, to

[1] Definitions of capitalized terms are set forth in section 7, below.

develop, license and distribute modified or derivative versions of such Intellectual Property, provided that the Operating Systems Business does not grant rights to such versions to the Applications Business. In the case of such Intellectual Property that is related to the Internet browser, the license shall not grant the Operating Systems Business any right to develop, license, or distribute modified or derivative versions of the Internet browser.

iii. The transfer of ownership of the Separated Business by means of a distribution of stock of the Separated Business to Non-Covered Shareholders of Microsoft, or by other disposition that does not result in a Covered Shareholder owning stock in both the Separated Business and the Remaining Business.

d. Until Implementation of the Plan, Microsoft shall:

i. preserve, maintain, and operate the Operating Systems Business and the Applications Business as ongoing, economically viable businesses, with management, sales, products, and operations of each business held as separate, distinct and apart from one another as they were on April 27, 2000, except to provide the accounting, management, and information services or other necessary support functions provided by Microsoft prior to the entry of this Final Judgment;

ii. use all reasonable efforts to maintain and increase the sales and revenues of both the

products produced or sold by the Operating Systems Business and those produced or sold by the Applications Business prior to the Implementation of the Plan and to support research and development and business development efforts of both the Operating Systems Business and the Applications Business;

iii. take no action that undermines, frustrates, interferes with, or makes more difficult the divestiture required by this Final Judgment without the prior approval of the Court; and

iv. file a report with the Court 90 days after entry of this Final Judgment on the steps Microsoft has taken to comply with the requirements of this section 1.d.

2. Provisions Implementing Divestiture

a. After Implementation of the Plan, and throughout the term of this Final Judgment, neither the Operating Systems Business nor the Applications Business, nor any member of their respective Boards of Directors, shall acquire any securities or assets of the other Business; no Covered Shareholder holding securities of either the Operating Systems Business or the Applications Business shall acquire any securities or assets of or shall be an officer, director, or employee of the other Business; and no person who is an officer, director, or employee of the Operating Systems Business or the Applications Business shall be an officer, director, or employee of the other Business.

b. After Implementation of the Plan and throughout the term of this Final Judgment, the Operating

Systems Business and the Applications Business shall be prohibited from:

i. merging or otherwise recombining, or entering into any joint venture with one another;

ii. entering into any Agreement with one another under which one of the Businesses develops, sells, licenses for sale or distribution, or distributes products or services (other than the technologies referred to in the following sentence) developed, sold, licensed, or distributed by the other Business;

iii. providing to the other any APIs, Technical Information, Communications Interfaces, or technical information that is not simultaneously published, disclosed, or made readily available to ISVs, IHVs, and OEMs; and

iv. licensing, selling or otherwise providing to the other Business any product or service on terms more favorable than those available to any similarly situated third party.

Section 2.b.ii shall not prohibit the Operating Systems Business and the Applications Business from licensing technologies (other than Middleware Products) to each other for use in each others' products or services provided that such technology (i) is not and has not been separately sold, licensed, or offered as a product, and (ii) is licensed on terms that are otherwise consistent with this Final Judgment.

c. Three months after Implementation of the Plan and once every three months thereafter

throughout the term of this Final Judgment, the Operating Systems Business and the Applications Business shall file with the Plaintiffs a copy of each Agreement (and a memorandum describing each oral Agreement) entered into between them.

d. Throughout the term of this Final Judgment, Microsoft, the Operating Systems Business and the Applications Business shall be prohibited from taking adverse action against any person or entity in whole or in part because such person or entity provided evidence in this case.

e. The obligations and restrictions set forth in sections 3 and 4 herein shall, after the Implementation of the Plan, apply only to the Operating Systems Business.

3. Provisions In Effect Until Full Implementation of the Plan of Divestiture . The provisions in this section 3 shall remain in effect until the earlier of three years after the Implementation of the Plan or the expiration of the term of this Final Judgment.

a. OEM Relations.

i. Ban on Adverse Actions for Supporting Competing Products. Microsoft shall not take or threaten any action adversely affecting any OEM (including but not limited to giving or withholding any consideration such as licensing terms; discounts; technical, marketing, and sales support; enabling programs; product information; technical information; information about future plans; developer tools or developer support; hardware certification; and permission to display trademarks or logos) based directly or

indirectly, in whole or in part, on any actual or contemplated action by that OEM:

(1) to use, distribute, promote, license, develop, produce or sell any product or service that competes with any Microsoft product or service; or

(2) to exercise any of the options or alternatives provided under this Final Judgment.

ii. Uniform Terms for Windows Operating System Products Licensed to Covered OEMs. Microsoft shall license Windows Operating System Products to Covered OEMs pursuant to uniform license agreements with uniform terms and conditions and shall not employ market development allowances or discounts in connection with Windows Operating System Products. Without limiting the foregoing, Microsoft shall charge each Covered OEM the applicable royalty for Windows Operating System Products as set forth on a schedule, to be established by Microsoft and published on a web site accessible to plaintiffs and all Covered OEMs , that provides for uniform royalties for Windows Operating System Products, except that -

(1) the schedule may specify different royalties for different language versions, and

(2) the schedule may specify reasonable volume discounts based upon actual volume of total shipments of Windows Operating System Products.

Without limiting the foregoing, Microsoft shall afford Covered OEMs equal access to licensing terms; discounts; technical, marketing, and sales support; product information; technical information; information about future plans; developer tools or developer support; hardware certification; and permission to display trademarks or logos. The foregoing requirement insofar as it relates to access to technical information and information about future plans shall not apply to any bona fide joint development effort by Microsoft and a Covered OEM with respect to confidential matters within the scope of that effort. Microsoft shall not terminate a Covered OEM's license for a Windows Operating System Product without having first given the Covered OEM written notice of the reason for the proposed termination and not less than thirty days' opportunity to cure. Microsoft shall not enforce any provision in any Agreement with a Covered OEM that is inconsistent with this Final Judgment.

iii. OEM Flexibility in Product Configuration. Microsoft shall not restrict (by contract or otherwise, including but not limited to granting or withholding consideration) an OEM from modifying the boot sequence, startup folder, internet connection wizard, desktop, preferences, favorites, start page, first screen, or other aspect of a Windows Operating System Product to -

(1) include a registration sequence to obtain subscription or other information from the user;

(2) display icons of or otherwise feature other products or services, regardless of the size or shape of such icons or features, or to remove the icons, folders, start menu entries, or favorites of Microsoft products or services;

(3) display any user interfaces, provided that an icon is also displayed that allows the user to access the Windows user interface; or

(4) launch automatically any non-Microsoft Middleware, Operating System or application, offer its own Internet access provider or other start-up sequence, or offer an option to make non-Microsoft Middleware the Default Middleware and to remove the means of End-User Access for Microsoft's Middleware Product.

b. Disclosure of APIs, Communications Interfaces and Technical Information. Microsoft shall disclose to ISVs, IHVs, and OEMs in a Timely Manner, in whatever media Microsoft disseminates such information to its own personnel, all APIs, Technical Information and Communications Interfaces that Microsoft employs to enable -

i. Microsoft applications to interoperate with Microsoft Platform Software installed on the same Personal Computer, or

ii. a Microsoft Middleware Product to interoperate with Windows Operating System software (or Middleware distributed with such Operating System) installed on the same Personal Computer, or

iii. any Microsoft software installed on one computer (including but not limited to server Operating Systems and operating systems for handheld devices) to interoperate with a Windows Operating System (or Middleware distributed with such Operating System) installed on a Personal Computer.

To facilitate compliance, and monitoring of compliance, with the foregoing, Microsoft shall create a secure facility where qualified representatives of OEMs, ISVs, and IHVs shall be permitted to study, interrogate and interact with relevant and necessary portions of the source code and any related documentation of Microsoft Platform Software for the sole purpose of enabling their products to interoperate effectively with Microsoft Platform Software (including exercising any of the options in section 3.a.iii).

c. Knowing Interference with Performance. Microsoft shall not take any action that it knows will interfere with or degrade the performance of any non-Microsoft Middleware when interoperating with any Windows Operating System Product without notifying the supplier of such non-Microsoft Middleware in writing that Microsoft intends to take such action, Microsoft's reasons for taking the action, and any ways known to Microsoft for the supplier to avoid or reduce interference with, or the degrading of, the performance of the supplier's Middleware.

d. Developer Relations. Microsoft shall not take or threaten any action affecting any ISV or IHV (including but not limited to giving or withholding any consideration such as licensing terms; discounts; technical, marketing, and sales

support; enabling programs; product information; technical information; information about future plans; developer tools or developer support; hardware certification; and permission to display trademarks or logos) based directly or indirectly, in whole or in part, on any actual or contemplated action by that ISV or IHV to -

i. use, distribute, promote or support any Microsoft product or service, or

ii. develop, use, distribute, promote or support software that runs on non-Microsoft Middleware or a non-Microsoft Operating System or that competes with any Microsoft product or service, or

iii. exercise any of the options or alternatives provided under this Final Judgment.

e. Ban on Exclusive Dealing. Microsoft shall not enter into or enforce any Agreement in which a third party agrees, or is offered or granted consideration, to -

i. restrict its development, production, distribution, promotion or use of, or payment for, any non-Microsoft Platform Software,

ii. distribute, promote or use any Microsoft Platform Software exclusively,

iii. degrade the performance of any non-Microsoft Platform Software, or

iv. in the case of an agreement with an Internet access provider or Internet content provider, distribute, promote or use Microsoft software in exchange for placement with respect to any aspect of a Windows Operating System Product.

f. Ban on Contractual Tying. Microsoft shall not condition the granting of a Windows Operating System Product license, or the terms or administration of such license, on an OEM or other licensee agreeing to license, promote, or distribute any other Microsoft software product that Microsoft distributes separately from the Windows Operating System Product in the retail channel or through Internet access providers, Internet content providers, ISVs or OEMs, whether or not for a separate or positive price.

g. Restriction on Binding Middleware Products to Operating System Products. Microsoft shall not, in any Operating System Product distributed six or more months after the effective date of this Final Judgment, Bind any Middleware Product to a Windows Operating System unless:

i. Microsoft also offers an otherwise identical version of that Operating System Product in which all means of End-User Access to that Middleware Product can readily be removed (a) by OEMs as part of standard OEM preinstallation kits and (b) by end users using add-remove utilities readily accessible in the initial boot process and from the Windows desktop; and

ii. when an OEM removes End-User Access to a Middleware Product from any Personal Computer on which Windows is preinstalled, the royalty paid by that OEM for that copy of Windows is reduced in an amount not less than the product of the otherwise applicable royalty and the ratio of the number of amount in bytes of binary code of (a) the Middleware Product as distributed separately from a Windows

Operating System Product to (b) the applicable version of Windows.

h. Agreements Limiting Competition. Microsoft shall not offer, agree to provide, or provide any consideration to any actual or potential Platform Software competitor in exchange for such competitor's agreeing to refrain or refraining in whole or in part from developing, licensing, promoting or distributing any Operating System Product or Middleware Product competitive with any Windows Operating System Product or Middleware Product.

i. Continued Licensing of Predecessor Version. Microsoft shall, when it makes a major Windows Operating System Product release (such as Windows 95, OSR 2.0, OSR 2.5, Windows 98, Windows 2000 Professional, Windows "Millennium," "Whistler," "Blackcomb," and successors to these), continue for three years after said release to license on the same terms and conditions the previous Windows Operating System Product to any OEM that desires such a license. The net royalty rate for the previous Windows Operating System Product shall be no more than the average royalty paid by the OEM for such Product prior to the release. The OEM shall be free to market Personal Computers in which it preinstalls such an Operating System Product in the same manner in which it markets Personal Computers preinstalled with other Windows Operating System Products.

4. Internal Antitrust Compliance. This section shall remain in effect throughout the term of this Final Judgment, provided that, consistent with section 2.e, this section shall not apply to the Applications Business after the Implementation of the Plan.

a. Within 90 days after the effective date of this Final Judgment, Microsoft shall establish a Compliance Committee of its corporate Board of Directors, consisting of not fewer than three members of the Board of Directors who are not present or former employees of Microsoft.

b. The Compliance Committee shall hire a Chief Compliance Officer, who shall report directly to the Compliance Committee and to the Chief Executive Officer of Microsoft.

c. The Chief Compliance Officer shall be responsible for development and supervision of Microsoft's internal programs to ensure compliance with the antitrust laws and this Final Judgment.

d. Microsoft shall give the Chief Compliance Officer sufficient authority and resources to discharge the responsibilities listed herein.

e. The Chief Compliance Officer shall:

i. within 90 days after entry of this Final Judgment, cause to be delivered to each Microsoft officer, director, and Manager, and each platform software developer and employee involved in relations with OEMs, ISVs, or IHVs, a copy of this Final Judgment together with additional informational materials describing the conduct prohibited and required by this Final Judgment;

ii. distribute in a timely manner a copy of this Final Judgment and such additional informational materials to any person who succeeds to a position of officer, director, or Manager, or platform software developer or

employee involved in relations with OEMs, ISVs or IHVs;

iii. obtain from each officer, director, and Manager, and each platform software developer and employee involved in relations with OEMs, ISVs or IHVs, within 90 days of entry of this Final Judgment, and for each person thereafter succeeding to such a position within 5 days of such succession, a written certification that he or she:

(1) has read, understands, and agrees to abide by the terms of this Final Judgment; and

(2) has been advised and understands that his or her failure to comply with this Final Judgment may result in conviction for criminal contempt of court;

iv. maintain a record of persons to whom this Final Judgment has been distributed and from whom, pursuant to Section 4.e.iii, such certifications have been obtained;

v. establish and maintain a means by which employees can report potential violations of this Final Judgment or the antitrust laws on a confidential basis; and

vi. report immediately to Plaintiffs and the Court any violation of this Final Judgment.

f. The Chief Compliance Officer may be removed only by the Chief Executive Officer with the concurrence of the Compliance Committee.

g. Microsoft shall, with the supervision of the Chief Compliance Officer, maintain for a period of at

least four years the e-mail of all Microsoft officers, directors and managers engaged in software development, marketing, sales and developer relations related to Platform Software.

5. Compliance Inspection. This section shall remain in effect throughout the term of this Final Judgment.

a. For purposes of determining or securing implementation of or compliance with this Final Judgment, including the provisions requiring a plan of divestiture, or determining whether this Final Judgment should be modified or vacated, and subject to any legally recognized privilege, from time to time:

i. Duly authorized representatives of a Plaintiff, upon the written request of the Assistant Attorney General in charge of the Antitrust Division of the United States Department of Justice, or the Attorney General of a Plaintiff State, as the case may be, and on reasonable notice to Microsoft made to its principal office, shall be permitted:

(1) Access during office hours to inspect and copy or, at Plaintiffs' option, demand Microsoft provide copies of all books, ledgers, accounts, correspondence, memoranda, source code, and other records and documents in the possession or under the control of Microsoft (which may have counsel present), relating to the matters contained in this Final Judgment; and

(2) Subject to the reasonable convenience of Microsoft and without restraint or

interference from it, to interview, either informally or on the record, its officers, employees, and agents, who may have their individual counsel present, regarding any such matters.

ii. Upon the written request of the Assistant Attorney General in charge of the Antitrust Division of the United States Department of Justice, or the Attorney General of a Plaintiff State, as the case may be, made to Microsoft at its principal offices, Microsoft shall submit such written reports, under oath if requested, as may be requested with respect to any matter contained in this Final Judgment.

iii. No information or documents obtained by the means provided in this section shall be divulged by a representative of a Plaintiff to any person other than a duly authorized representative of a Plaintiff, except in the course of legal proceedings to which the Plaintiff is a party (including grand jury proceedings), or for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

iv. If at the time information or documents are furnished by Microsoft to a Plaintiff, Microsoft represents and identifies in writing the material in any such information or documents to which a claim of protection may be asserted under Rule 26(c)(7) of the Federal Rules of Civil Procedure, and Microsoft marks each pertinent page of such material, "Subject to claim of protection under Rule 26(c)(7) of the Federal Rules of Civil Procedure," then 10 calendar days

notice shall be given by a Plaintiff to Microsoft prior to divulging such material in any legal proceeding (other than a grand jury proceeding) to which Microsoft is not a party.

6. Effective Date, Term, Retention of Jurisdiction, Modification.

a. This Final Judgment shall take effect 90 days after the date on which it is entered; provided, however that sections 1.b and 2 (except 2.d) shall be stayed pending completion of any appeals from this Final Judgment.

b. Except as provided in section 2.e, the provisions of this Final Judgment apply to Microsoft as defined in section 7.o of this Final Judgment.

c. This Final Judgment shall expire at the end of ten years from the date on which it takes effect.

d. The Court may act *sua sponte* to issue orders or directions for the construction or carrying out of this Final Judgment, for the enforcement of compliance therewith, and for the punishment of any violation thereof.

e. Jurisdiction is retained by this Court for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders or directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, for the modification of any of the provisions hereof, for the enforcement of compliance herewith, and for the punishment of any violation hereof.

f. In accordance with the Court's Conclusions of Law, the plaintiff States shall submit a motion for costs and fees, with supporting documents as

necessary, no later than 45 days after the entry of this Final Judgment.

7. Definitions.

a. "Agreement" means any agreement, arrangement, alliance, understanding or joint venture, whether written or oral.

b. "Application Programming Interfaces (APIs)" means the interfaces, service provider interfaces, and protocols that enable a hardware device or an application, Middleware, or server Operating System to obtain services from (or provide services in response to requests from) Platform Software in a Personal Computer and to use, benefit from, and rely on the resources, facilities, and capabilities of such Platform Software.

c. "Applications Business" means all businesses carried on by Microsoft Corporation on the effective date of this Final Judgment except the Operating Systems Business. Applications Business includes but is not limited to the development, licensing, promotion, and support of client and server applications and Middleware (e.g., Office, BackOffice, Internet Information Server, SQL Server, etc.), Internet Explorer, Mobile Explorer and other web browsers, Streaming Audio and Video client and server software, transaction server software, SNA server software, indexing server software, XML servers and parsers, Microsoft Management Server, Java virtual machines, Frontpage Express (and other web authoring tools), Outlook Express (and other e-mail clients), Media player, voice recognition software, Net Meeting (and other collaboration software), developer tools, hardware, MSN, MSNBC, Slate, Expedia, and all investments

owned by Microsoft in partners or joint venturers, or in ISVs, IHVs, OEMs or other distributors, developers, and promoters of Microsoft products, or in other information technology or communications businesses.

d. "Bind" means to include a product in an Operating System Product in such a way that either an OEM or an end user cannot readily remove or uninstall the product.

e. "Business" means the Operating Systems Business or the Applications Business.

f. "Communications Interfaces" means the interfaces and protocols that enable software installed on other computers (including servers and handheld devices) to interoperate with the Microsoft Platform Software on a Personal Computer.

g. "Covered OEM" means one of the 20 OEMs with the highest volume of licenses of Windows Operating System Products from Microsoft in the calendar year preceding the effective date of the Final Judgment. At the beginning of each year, starting on January 1, 2002, Microsoft shall redetermine the Covered OEMs for the new calendar year, based on sales volume during the preceding calendar year.

h. "Covered Shareholder" means a shareholder of Microsoft on the date of entry of this Final Judgment who is a present or former employee, officer or director of Microsoft and who owns directly or beneficially more than 5 percent of the voting stock of the firm.

i. "Default Middleware" means Middleware configured to launch automatically (that is, by

"default") to provide particular functionality when other Middleware has not been selected for this purpose. For example, a default browser is Middleware configured to launch automatically to display Web pages transmitted over the Internet or an intranet that bear the .htm extension, when other software has not been selected for this purpose.

j. "End-User Access" means the invocation of Middleware directly or indirectly by an end user of a Personal Computer or the ability of such an end user to invoke Middleware. "End-User Access" includes invocation of Middleware by end users which is compelled by the design of the Operating System Product.

k. "IHV" means an independent hardware vendor that develops hardware to be included in or used with a Personal Computer.

l. "Implementation of the Plan" means full completion of all of the steps described in section 1.c.

m. "Intellectual Property" means copyrights, patents, trademarks and trade secrets used by Microsoft or licensed by Microsoft to third parties.

n. "ISV" means any entity other than Microsoft (or any subsidiary, division, or other operating unit of any such other entity) that is engaged in the development and licensing (or other marketing) of software products intended to interoperate with Microsoft Platform Software.

o. "Manager" means a Microsoft employee who is responsible for the direct or indirect supervision of more than 100 other employees.

p. "Microsoft" means Microsoft Corporation, the Separated Business, the Remaining Business, their successors and assigns (including any transferee or assignee of any ownership rights to, control of, or ability to license the patents referred to in this Final Judgment), their subsidiaries, affiliates, directors, officers, managers, agents, and employees, and all other persons in active concert or participation with any of them who shall have received actual notice of this Final Judgment by personal service or otherwise.

q. "Middleware" means software that operates, directly or through other software, between an Operating System and another type of software (such as an application, a server Operating System, or a database management system) by offering services via APIs or Communications Interfaces to such other software, and could, if ported to or interoperable with multiple Operating Systems, enable software products written for that Middleware to be run on multiple Operating System Products. Examples of Middleware within the meaning of this Final Judgment include Internet browsers, e-mail client software, multimedia viewing software, Office, and the Java Virtual Machine. Examples of software that are not Middleware within the meaning of this Final Judgment are disk compression and memory management.

r. "Middleware Product" means

   i. Internet browsers, e-mail client software, multimedia viewing software, instant messaging software, and voice recognition software, or

ii. software distributed by Microsoft that -

(1) is, or has in the applicable preceding year been, distributed separately from an Operating System Product in the retail channel or through Internet access providers, Internet content providers, ISVs or OEMs, and

(2) provides functionality similar to that provided by Middleware offered by a competitor to Microsoft.

s. "Non-Covered Shareholder" means a shareholder of Microsoft on the record date for the transaction that effects the transfer of ownership of the Separated Business under Section 1.c.iii who is not a Covered Shareholder on the date of entry of this Final Judgment.

t. "OEM" means the manufacturer or assembler of a personal computer.

u. "Operating System" means the software that controls the allocation and usage of hardware resources (such as memory, central processing unit time, disk space, and peripheral devices) of a computer, providing a "platform" by exposing APIs that applications use to "call upon" the Operating System's underlying software routines in order to perform functions.

v. "Operating System Product" means an Operating System and additional software shipped with the Operating System, whether or not such additional software is marketed for a positive price. An Operating System Product includes Operating System Product upgrades that may be distributed separately from the Operating System Product.

w. "Operating Systems Business" means the development, licensing, promotion, and support of Operating System Products for computing devices including but not limited to (i) Personal Computers, (ii) other computers based on Intel x86 or competitive microprocessors, such as servers, (iii) handheld devices such as personal digital assistants and cellular telephones, and (iv) television set-top boxes.

x. "Personal Computer" means any computer configured so that its primary purpose is to be used by one person at a time, that uses a video display and keyboard (whether or not the video display and keyboard are actually included), and that contains an Intel x86, successor, or competitive microprocessor, and computers that are commercial substitutes for such computers.

y. "Plaintiff" means the United States or any of the plaintiff States in this action.

z. "Plan" means the final plan of divestiture approved by the Court.

aa. "Platform Software" means an Operating System or Middleware or a combination of an Operating System and Middleware.

bb. "Remaining Business" means whichever of the Operating Systems Business and the Applications Businesses is not transferred to a separate entity pursuant to the Plan.

cc. "Separated Business" means whichever of the Operating Systems Business and the Applications Businesses is transferred to a separate entity pursuant to the Plan.

dd. "Technical Information" means all information regarding the identification and means of using

APIs and Communications Interfaces that competent software developers require to make their products running on any computer interoperate effectively with Microsoft Platform Software running on a Personal Computer. Technical information includes but is not limited to reference implementations, communications protocols, file formats, data formats, syntaxes and grammars, data structure definitions and layouts, error codes, memory allocation and deallocation conventions, threading and synchronization conventions, functional specifications and descriptions, algorithms for data translation or reformatting (including compression/decompression algorithms and encryption/decryption algorithms), registry settings, and field contents.

ee. "Timely Manner": disclosure of APIs, Technical Information and Communications Interfaces in a timely manner means, at a minimum, publication on a web site accessible by ISVs, IHVs, and OEMs at the earliest of the time that such APIs, Technical Information, or Communications Interfaces are (1) disclosed to Microsoft's applications developers, (2) used by Microsoft's own Platform Software developers in software released by Microsoft in alpha, beta, release candidate, final or other form, (3) disclosed to any third party, or (4) within 90 days of a final release of a Windows Operating System Product, no less than 5 days after a material change is made between the most recent beta or release candidate version and the final release.

ff. "Windows Operating System Product" means software code (including source code and binary code, and any other form in which Microsoft distributes its Windows Operating Systems for

Personal Computers) of Windows 95, Windows 98, Windows 2000 Professional, and their successors, including the Windows Operating Systems for Personal Computers codenamed "Millennium," "Whistler," and "Blackcomb," and their successors.

/s/

Thomas Penfield Jackson
U.S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Received
Jun 13 2000
Nancy Mayer-
Whittington, Clerk
U.S. District Court

UNITED STATES OF AMERICA,
Plaintiff,
vs.
MICROSOFT CORPORATION,
Defendant.

Civil Action
No. 98-1232 (TPJ)

NOTICE OF APPEAL

Defendant Microsoft Corporation hereby appeals to the United States Court of Appeals for the District of Columbia Circuit from the Final Judgment entered in this action on June 7, 2000, as well as from the Order entered in this action on April 3, 2000 (save from the portion of the Order dismissing the plaintiff's first claim for relief). Pursuant to Rule 42(a) of the Federal Rules of Civil Procedure, the district court consolidated this action with Civil Action No.

98-1233 (TPJ) for purposes of trial. An appeal is also taken in that action this day.

/s/

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Counsel for Defendant Microsoft Corporation

June 13, 2000

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF NEW YORK *ex rel.* Attorney General ELIOT SPITZER, *et al.*, Plaintiffs, vs. MICROSOFT CORPORATION, Defendant.	Received Jun 13 2000 Nancy Mayer- Whittington, Clerk U.S. District Court Civil Action No. 98-1233 (TPJ)
MICROSOFT CORPORATION, Counterclaim-Plaintiff, vs. ELIOT SPITZER, Attorney General of the State of New York, In his official capacity, *et al.*, Counterclaim-Defendants.	

NOTICE OF APPEAL

Defendant and Counterclaim-Plaintiff Microsoft Corporation hereby appeals to the United States Court of Appeals for the District of Columbia Circuit from the Final Judgment entered in this action on June 7, 2000, as well as from the Order entered in this action on April 3, 2000 (save for that portion of the Order dismissing plaintiffs' fifth claim for relief). Pursuant to Rule 42(a) of the Federal Rules of Civil Procedure, the district court consolidated this action

with Civil Action No. 98-1232 (TPJ) for purposes of trial. An appeal is also taken in that action this day.

/s/

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Counterclaim-Plaintiff
Microsoft Corporation

June 13, 2000

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. MICROSOFT CORPORATION, Defendant.	Civil Action No. 98-1232 (TPJ)
STATE OF NEW YORK, *et al.*, Plaintiffs, v. MICROSOFT CORPORATION, Defendant.	Filed Jun 20 2000 Nancy Mayer-Whittington, Clerk U.S. District Court Civil Action No. 98-1233 (TPJ)
MICROSOFT CORPORATION, Counterclaim-Plaintiff, v. ELIOT SPITZER, attorney general of the State of New York, in his official capacity, *et al.*, Counterclaim-Defendants.	

ORDER

Upon consideration of the joint motion of the plaintiffs for certification pursuant to 15 U.S.C. § 29(b), and the opposition of defendant Microsoft Corporation thereto, it is, this 20th day of June, 2000,

ORDERED, that the joint motion by plaintiffs for certification pursuant to 15 U.S.C. § 29(b) is granted, and this Court hereby certifies that immediate consideration by the Supreme Court of the appeal taken herein is of general public importance in the administration of justice; and it is

FURTHER ORDERED, that the Final Judgment of June 7, 2000, is stayed in its entirety until the appeal therefrom is heard and decided, unless the stay is earlier vacated by an appellate court.

/s/
Thomas Penfield Jackson
U.S. District Judge

STATUTORY PROVISIONS INVOLVED

15 U.S.C. § 1

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 2

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 29

(a) Court of appeals; review by Supreme Court

Except as otherwise expressly provided by this section, in every civil action brought in any district court of the United States under the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies", approved July 2, 1890, or any other Acts having like purpose that have been or hereafter may be enacted, in which the United States is the complainant

and equitable relief is sought, any appeal from a final judgment entered in any such action shall be taken to the court of appeals pursuant to sections 1291 and 2107 of Title 28. Any appeal from an interlocutory order entered in any such action shall be taken to the court of appeals pursuant to sections 1292(a)(1) and 2107 of Title 28 but not otherwise. Any judgment entered by the court of appeals in any such action shall be subject to review by the Supreme Court upon a writ of certiorari as provided in section 1254(1) of Title 28.

(b) Direct appeals to Supreme Court

An appeal from a final judgment pursuant to subsection (a) of this section shall lie directly to the Supreme Court, if, upon application of a party filed within fifteen days of the filing of a notice of appeal, the district judge who adjudicated the case enters an order stating that immediate consideration of the appeal by the Supreme Court is of general public importance in the administration of justice. Such order shall be filed within thirty days after the filing of a notice of appeal. When such an order is filed, the appeal and any cross appeal shall be docketed in the time and manner prescribed by the rules of the Supreme Court. The Supreme Court shall thereupon either (1) dispose of the appeal and any cross appeal in the same manner as any other direct appeal authorized by law, or (2) in its discretion, deny the direct appeal and remand the case to the court of appeals, which shall then have jurisdiction to hear and determine the same as if the appeal and any cross appeal therein had been docketed in the court of appeals in the first instance pursuant to subsection (a) of this section.

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

CAL. BUS. & PROF. CODE § 16720

A trust is a combination of capital, skill or acts by two or more persons for any of the following purposes:

(a) To create or carry out restrictions in trade or commerce.

(b) To limit or reduce the production, or increase the price of merchandise or of any commodity.

(c) To prevent competition in manufacturing, making, transportation, sale or purchase of merchandise, produce or any commodity.

(d) To fix at any standard or figure, whereby its price to the public or consumer shall be in any manner controlled or established, any article or commodity of merchandise, produce or commerce intended for sale, barter, use or consumption in this State.

(e) To make or enter into or execute or carry out any contracts, obligations or agreements of any kind or description, by which they do all or any or any combination of any of the following:

(1) Bind themselves not to sell, dispose of or transport any article or any commodity or any article of trade, use, merchandise, commerce or consumption below a common standard figure, or fixed value.

(2) Agree in any manner to keep the price of such article, commodity or transportation at a fixed or graduated figure.

(3) Establish or settle the price of any article, commodity or transportation between them or themselves and others, so as directly or indirectly to preclude a free and unrestricted competition among themselves, or any purchasers or consumers in the sale or transportation of any such article or commodity.

(4) Agree to pool, combine or directly or indirectly unite any interests that they may have connected with the sale or transportation of any such article or commodity, that its price might in any manner be affected.

CAL. BUS. & PROF. CODE § 16726

Except as provided in this chapter, every trust is unlawful, against public policy and void.

CAL. BUS. & PROF. CODE § 17200

As used in this chapter, unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by Chapter 1 (commencing with Section 17500) of Part 3 of Division 7 of the Business and Professions Code.

CONN. GEN. STAT. § 35-26

Every contract, combination, or conspiracy in restraint of any part of trade or commerce is unlawful.

CONN. GEN. STAT. § 35-27

Every contract, combination, or conspiracy to monopolize, or attempt to monopolize, or monopolization of any part of trade or commerce is unlawful.

CONN. GEN. STAT. § 35-29

Every lease, sale or contract for the furnishing of services or for the sale of commodities, or for the fixing of prices charged therefor, or for the giving or selling of a discount or rebate therefrom, on the condition or understanding that the lessee or purchaser shall not deal in the services or the commodities of a competitor or competitors of the lessor or seller, shall be unlawful where the effect of such lease or sale or contract for sale or such condition or understanding may be to substantially lessen competition or tend to create a monopoly in any part of trade or commerce and where such goods or services are for the use, consumption or resale in this state.

D.C. CODE ANN. § 28-4502

Every contract, combination in the form of a trust or otherwise, or conspiracy in restraint of trade or commerce all or any part of which is within the District of Columbia is declared to be illegal.

D.C. CODE ANN. § 28-4503

It shall be unlawful for any person to monopolize, attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of trade or commerce, all or any part of which is within the District of Columbia.

FLA. STAT. CH. 501.204

(1) Unfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

(2) It is the intent of the Legislature that, in construing subsection (1), due consideration and great weight shall be given to the interpretations of the Federal Trade Commission and the federal courts relating to s. 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. s. 45(a)(1).

FLA. STAT. CH. 542.18

Every contract, combination, or conspiracy in restraint of trade or commerce in this state is unlawful.

FLA. STAT. CH. 542.19

It is unlawful for any person to monopolize, attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of trade or commerce in this state.

740 ILL. COMP. STAT. 10/3

Every person shall be deemed to have committed a violation of this Act who shall:

(1) Make any contract with, or engage in any combination or conspiracy with, any other person who is, or but for a prior agreement would be, a competitor of such person:

a. for the purpose or with the effect of fixing, controlling, or maintaining the price or rate charged for any commodity sold or bought by the parties thereto, or the fee charged or paid for any service performed or received by the parties thereto;

b. fixing, controlling, maintaining, limiting, or discontinuing the production, manufacture, mining, sale or supply of any commodity, or the sale or supply of any service, for the purpose or with the effect stated in paragraph a. of subsection (1);

c. allocating or dividing customers, territories, supplies, sales, or markets, functional or geographical, for any commodity or service; or

(2) By contract, combination, or conspiracy with one or more other persons unreasonably restrain trade or commerce; or

(3) Establish, maintain, use, or attempt to acquire monopoly power over any substantial part of trade or commerce of this State for the purpose of excluding competition or of controlling, fixing, or maintaining prices in such trade or commerce; or

(4) Lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, or services (including master antenna television service), whether patented or unpatented, for use, consumption, enjoyment, or resale, or fix a price charged thereof, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodity or service (including cable television service or cable television relay service), of a competitor or competitors of the lessor or seller, where the effect of such lease, sale or contract for such sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce; or

(5) Being an employee, officer or agent of any foreign government, or an employee, officer or agent of a corporation or other entity which does business with or seeks to do business with any foreign government or instrumentality thereof; enforce, attempt to enforce, agree to or take action to forward the aims of, any discriminatory practice by the foreign government which is based on race, color, creed, national ancestry or sex or on ethnic or religious grounds, where such conduct, course of conduct, or agreement takes place in whole or in part within the United States and affects business in this State.

IOWA CODE § 553.4

A contract, combination, or conspiracy between two or more persons shall not restrain or monopolize trade or commerce in a relevant market.

IOWA CODE § 553.5

A person shall not attempt to establish or establish, maintain, or use a monopoly of trade or commerce in a relevant market for the purpose of excluding competition or of controlling, fixing, or maintaining prices.

KAN. STAT. ANN. § 50-101

A trust is a combination of capital, skill, or acts, by two or more persons, firms, corporations, or associations of persons, or either two or more of them, for either, any or all of the following purposes:

First. To create or carry out restrictions in trade or commerce, or aids to commerce, or to carry out restrictions in the full and free pursuit of any business authorized or permitted by the laws of this state.

Second. To increase or reduce the price of merchandise, produce or commodities, or to control the cost or rates of insurance.

Third. To prevent competition in the manufacture, making, transportation, sale or purchase of merchandise, produce or commodities, or to prevent competition in aids to commerce.

Fourth. To fix any standard or figure, whereby its price to the public shall be, in any manner, controlled or established, any article or commodity of merchandise,

produce or commerce intended for sale, use or consumption in this state.

Fifth. To make or enter into, or execute or carry out, any contract, obligation or agreement of any kind or description by which they shall bind or have to bind themselves not to sell, manufacture, dispose of or transport any article or commodity, or article of trade, use, merchandise, commerce or consumption below a common standard figure; or by which they shall agree in any manner to keep the price of such article, commodity or transportation at a fixed or graded figure; or by which they shall in any manner establish or settle the price of any article or commodity or transportation between them or themselves and others to preclude a free and unrestricted competition among themselves or others in transportation, sale or manufacture of any such article or commodity; or by which they shall agree to pool, combine or unite any interest they may have in connection with the manufacture, sale or transportation of any such article or commodity, that its price may in any manner be affected. And any such combinations are hereby declared to be against public policy, unlawful and void.

KAN. STAT. ANN. § 50-112

All arrangements, contracts, agreements, trusts, or combinations between persons or corporations made with a view or which tend to prevent full and free competition in the importation, transportation or sale of articles imported into this state, or in the product, manufacture or sale of articles of domestic growth or product of domestic raw material, or for the loan or use of money, or to fix attorneys' or doctors' fees, and all arrangements, contracts, agreements, trusts or combinations between persons or corporations, designed or which tend to advance, reduce or control the price or the cost to the producer or to the consumer of any

such products or articles, or to control the cost or rate of insurance, or which tend to advance or control the rate of interest for the loan or use of moneys to the borrower, or any other services, are hereby declared to be against public policy, unlawful and void.

KAN. STAT. ANN. § 50-132

Every person, servant, agent or employee of any firm or corporation doing business within the state of Kansas that shall conspire or combine with any other persons, firm or corporation within or without the state for the purpose of monopolizing any line of business, or shall conspire or combine for the purpose of preventing the producer of grain, seeds or livestock or hay, or the local buyer thereof, from shipping or marketing the same without the agency of any third person, firm or corporation, shall be deemed guilty of a misdemeanor, and on conviction shall be fined in a sum not less than one thousand dollars and not to exceed five thousand dollars for each offense.

KY. REV. STAT. ANN. § 367.170

(1) Unfair, false, misleading, or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

(2) For the purposes of this section, unfair shall be construed to mean unconscionable.

KY. REV. STAT. ANN. § 367.175

(1) Every contract, combination in the form of trust and otherwise, or conspiracy, in restraint of trade or commerce in this Commonwealth shall be unlawful.

(2) It shall be unlawful for any person or persons to monopolize, or attempt to monopolize or combine or conspire with any other person or persons to monopolize any part of the trade or commerce in this Commonwealth.

(3) The sale, delivery, holding, or offering for sale of any self-testing kits designed to tell persons their status concerning human immunodeficiency virus or acquired immunodeficiency syndrome or related disorders, and any advertising of such kits, shall be prohibited.

(4) In addition to any other penalties, violations of this section shall also be a Class C felony.

LA. REV. STAT. ANN. § 51:122

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce in this state is illegal.

Whoever violates this Section shall be fined not more than five thousand dollars, or imprisoned, with or without hard labor, not more than three years, or both.

LA. REV. STAT. ANN. § 51:123

No person shall monopolize, or attempt to monopolize, or combine, or conspire with any other person to monopolize any part of the trade or commerce within this state.

Whoever violates this Section shall be fined not more than five thousand dollars, or imprisoned, with or without hard labor, not more than three years, or both.

LA. REV. STAT. ANN. § 51:1405

A. Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

B. The director may make rules and regulations interpreting the provisions of this Chapter consistent with the provisions in R.S. 51:1 through R.S. 51:461.1, inclusive, and shall submit such rules and regulations to the attorney general. Upon approval by the attorney general, such rules and regulations shall be adopted in the form and manner prescribed by R.S. 49:951 et seq. The validity or applicability of a rule may be determined in an action for declaratory judgment in the district court of the parish in which the division is located or in the parish in which the plaintiff resides or is domiciled. Appeals may be had from any ruling of a district court in accordance with the Code of Civil Procedure, except that such appeals shall be given preference and heard in priority to other appeals.

C. The director and his employees are entitled to receive reimbursement for expenses actually and necessarily incurred in the performance of their duties.

MD. CODE ANN., COM. LAW § 11-204

(a) Prohibited conduct. -- A person may not:

(1) By contract, combination, or conspiracy with one or more other persons, unreasonably restrain trade or commerce;

(2) Monopolize, attempt to monopolize, or combine or conspire with one or more other persons to monopolize any part of the trade or commerce within the State, for the purpose of excluding competition or of controlling, fixing, or maintaining prices in trade or commerce;

(3) Directly or indirectly discriminate in price among purchasers of commodities or services of like grade and quality, if the effects of the discrimination may:

(i) Substantially lessen competition;

(ii) Tend to create a monopoly in any line of trade or commerce; or

(iii) Injure, destroy, or prevent competition with any person who grants or knowingly receives the benefit of the discrimination or with customers of either of them;

(4) In the course of commerce, pay or contract for the payment of anything of value to or for the benefit of a customer of the person as compensation for or in consideration of any service or facility furnished by or through the customer in connection with the processing, handling, sale, or offering for sale of any service or commodity manufactured, sold, or offered for sale by the person, unless the payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of the service or commodity;

(5) Discriminate in favor of one purchaser against another purchaser of a commodity bought for resale, with or without processing, by contracting to furnish, furnishing, or contributing to the furnishing of any service or facility connected with the processing, handling, sale, or offering for sale of the commodity on terms not accorded to all purchasers on proportionally equal terms; or

(6) Lease or make a sale or contract for the sale of a patented or unpatented commodity or service for use, consumption, enjoyment, or resale, or set a

price charged for the commodity or service or discount from or rebate on the price, on the condition, agreement, or understanding that the lessee or purchaser will not use or deal in the commodity or service of a competitor of the lessor or seller, if the effect of the lease, sale, or contract for sale or the condition, agreement, or understanding may:

(i) Substantially lessen competition; or

(ii) Tend to create a monopoly in any line of trade or commerce.

(b) Conduct not prohibited. -- Subsection (a) (3) through (6) of this section does not prevent:

(1) Differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which the commodity or service is sold or delivered to a purchaser;

(2) A person engaged in selling a commodity or service from selecting his own customers in bona fide transactions and not in restraint of trade;

(3) A person engaged in selling a commodity or service from granting employee discounts to his own bona fide employees;

(4) A seller from introducing evidence to rebut a case brought under subsection (a) (3) through (6) of this section to show that his lower price or the furnishing of services or facilities to a purchaser was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor; or

(5) Price changes, from time to time, in response to changing conditions affecting the market for or the marketability of a commodity, which

changing conditions include an actual or imminent deterioration of a perishable commodity, obsolescence of a seasonal commodity, distress sales under court process, or sales in good faith in discontinuance of business in the commodity.

MASS. GEN. LAWS CH. 93A, § 2

(a) Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

(b) It is the intent of the legislature that in construing paragraph (a) of this section in actions brought under sections four, nine and eleven, the courts will be guided by the interpretations given by the Federal Trade Commission and the Federal Courts to section 5(a)(1) of the Federal Trade Commission Act (15 U.S.C. 45(a)(1)), as from time to time amended.

(c) The attorney general may make rules and regulations interpreting the provisions of subsection 2(a) of this chapter. Such rules and regulations shall not be inconsistent with the rules, regulations and decisions of the Federal Trade Commission and the Federal Courts interpreting the provisions of 15 U.S.C. 45(a)(1) (The Federal Trade Commission Act), as from time to time amended.

MICH. COMP. LAWS § 445.772

A contract, combination, or conspiracy between 2 or more persons in restraint of, or to monopolize, trade or commerce in a relevant market is unlawful.

MICH. COMP. LAWS § 445.773

The establishment, maintenance, or use of a monopoly, or any attempt to establish a monopoly, of trade or commerce in a relevant market by any person, for the purpose of excluding or limiting competition or controlling, fixing, or maintaining prices, is unlawful.

MINN. STAT. § 325D.52

The establishment, maintenance, or use of, or any attempt to establish, maintain, or use monopoly power over any part of trade or commerce by any person or persons for the purpose of affecting competition or controlling, fixing, or maintaining prices is unlawful.

N.M. STAT. ANN. 57-1-1

Every contract, agreement, combination or conspiracy in restraint of trade or commerce, any part of which trade or commerce is within this state, is unlawful.

N.M. STAT. ANN. § 57-1-2

It is hereby declared to be unlawful for any person to monopolize or attempt to monopolize, or combine or conspire with any other person or persons to monopolize, trade or commerce, any part of which trade or commerce is within this state.

N.Y. GEN. BUS. LAW § 340

1. Every contract, agreement, arrangement or combination whereby

   A monopoly in the conduct of any business, trade or commerce or in the furnishing of any service in this

state, is or may be established or maintained, or whereby

Competition or the free exercise of any activity in the conduct of any business, trade or commerce or in the furnishing of any service in this state is or may be restrained or whereby

For the purpose of establishing or maintaining any such monopoly or unlawfully interfering with the free exercise of any activity in the conduct of any business, trade or commerce or in the furnishing of any service in this state any business, trade or commerce or the furnishing of any service is or may be restrained, is hereby declared to be against public policy, illegal and void.

2. Subject to the exceptions hereinafter provided in this section, the provisions of this article shall apply to licensed insurers, licensed insurance agents, licensed insurance brokers, licensed independent adjusters and other persons and organizations subject to the provisions of the insurance law, to the extent not regulated by provisions of article twenty-three of the insurance law; and further provided, that nothing in this section shall apply to the marine insurances, including marine protection and indemnity insurance and marine reinsurance, exempted from the operation of article twenty-three of the insurance law.

3. The provisions of this article shall not apply to cooperative associations, corporate or otherwise, of farmers, gardeners, or dairymen, including live stock farmers and fruit growers, nor to contracts, agreements or arrangements made by such associations, nor to bona fide labor unions.

4. The labor of human beings shall not be deemed or held to be a commodity or article of commerce as such terms are used in this section and nothing herein

contained shall be deemed to prohibit or restrict the right of workingmen to combine in unions, organizations and associations, not organized for the purpose of profit.

5. An action to recover damages caused by a violation of this section must be commenced within four years after the cause of action has accrued. The state, or any political subdivision or public authority of the state, or any person who shall sustain damages by reason of any violation of this section, shall recover three-fold the actual damages sustained thereby, as well as costs not exceeding ten thousand dollars, and reasonable attorneys' fees. At or before the commencement of any civil action by a party other than the attorney-general for a violation of this section, notice thereof shall be served upon the attorney-general. Where the aggrieved party is a political subdivision or public authority of the state, notice of intention to commence an action under this section must be served upon the attorney-general at least ten days prior to the commencement of such action. This section shall not apply to any action commenced prior to the effective date of this act.

6. In any action pursuant to this section, the fact that the state, or any political subdivision or public authority of the state, or any person who has sustained damages by reason of violation of this section has not dealt directly with the defendant shall not bar or otherwise limit recovery; provided, however, that in any action in which claims are asserted against a defendant by both direct and indirect purchasers, the court shall take all steps necessary to avoid duplicate liability, including but not limited to the transfer and consolidation of all related actions. In actions where both direct and indirect purchasers are involved, a defendant shall be entitled to prove as a partial or complete defense to a claim for damages that the illegal overcharge has been

passed on to others who are themselves entitled to recover so as to avoid duplication of recovery of damages.

N.C. GEN. STAT. § 75-1.1

(a) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.

(b) For purposes of this section, "commerce" includes all business activities, however denominated, but does not include professional services rendered by a member of a learned profession.

(c) Nothing in this section shall apply to acts done by the publisher, owner, agent, or employee of a newspaper, periodical or radio or television station, or other advertising medium in the publication or dissemination of an advertisement, when the owner, agent or employee did not have knowledge of the false, misleading or deceptive character of the advertisement and when the newspaper, periodical or radio or television station, or other advertising medium did not have a direct financial interest in the sale or distribution of the advertised product or service.

(d) Any party claiming to be exempt from the provisions of this section shall have the burden of proof with respect to such claim.

N.C. GEN. STAT. § 75-2.1

It is unlawful for any person to monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize, any part of trade or commerce in the State of North Carolina.

OHIO REV. CODE ANN. § 1331.01

As used in sections 1331.01 to 1331.14 of the Revised Code:

(A) "Person" includes corporations, partnerships, and associations existing under or authorized by any state or territory of the United States, and solely for the purpose of the definition of division (B) of this section, a foreign governmental entity.

(B) "Trust" is a combination of capital, skill, or acts by two or more persons for any of the following purposes:

(1) To create or carry out restrictions in trade or commerce;

(2) To limit or reduce the production, or increase or reduce the price of merchandise or a commodity;

(3) To prevent competition in manufacturing, making, transportation, sale, or purchase of merchandise, produce, or a commodity;

(4) To fix at a standard or figure, whereby its price to the public or consumer is in any manner controlled or established, an article or commodity of merchandise, produce, or commerce intended for sale, barter, use, or consumption in this state;

(5) To make, enter into, execute, or carry out contracts, obligations, or agreements of any kind by which they bind or have bound themselves not to sell, dispose of, or transport an article or commodity, or an article of trade, use, merchandise, commerce, or consumption below a common standard figure or fixed value, or by which they agree in any manner to keep

the price of such article, commodity, or transportation at a fixed or graduated figure, or by which they shall in any manner establish or settle the price of an article, commodity, or transportation between them or themselves and others, so as directly or indirectly to preclude a free and unrestricted competition among themselves, purchasers, or consumers in the sale or transportation of such article or commodity, or by which they agree to pool, combine, or directly or indirectly unite any interests which they have connected with the sale or transportation of such article or commodity, that its price might in any manner be affected;

(6) To refuse to buy from, sell to, or trade with any person because such person appears on a blacklist issued by, or is being boycotted by, any foreign corporate or governmental entity.

"Trust," as defined in this section, does not include bargaining by a labor organization in negotiating or effecting contracts with an employer or employer group with reference to minimum payment to any member of the labor organization for any motor vehicles owned, driven, and used exclusively by such member in the performance of his duties of employment pursuant to a collective bargaining agreement between the labor organization and the employer or employer group.

A trust as defined in division (B) of this section is unlawful and void.

OHIO REV. CODE ANN. § 1331.02

No person shall issue or own trust certificates, and no person shall enter into a combination, contract, or agreement, the purpose and effect of which is to place the management or control of such combination, or the product or service thereof, in the hands of a trustee with the intent to limit or fix the price or lessen the production or sale of an article or service of commerce, use, or consumption, to prevent, restrict, or diminish the manufacture or output of such article or service, or refuse to buy from, sell to, or trade with any person because such person appears on a blacklist issued by, or is being boycotted by, any foreign corporate or governmental entity.

UTAH CODE ANN. § 76-10-914

(1) Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce is declared to be illegal.

(2) It shall be unlawful for any person to monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize, any part of trade or commerce.

W. VA. CODE § 47-18-3

(a) Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce in this State shall be unlawful.

(b) Without limiting the effect of subsection (a) of this section, the following shall be deemed to restrain trade or commerce unreasonably and are unlawful:

(1) A contract, combination or conspiracy between two or more persons:

(A) For the purpose or with the effect of fixing, controlling, or maintaining the market price, rate or fee of any commodity or service; or

(B) Fixing, controlling, maintaining, limiting or discontinuing the production, manufacture, mining, sale or supply of any commodity, or the sale or supply of any service, for the purpose or with the effect of fixing, controlling or maintaining the market price, rate or fee of the commodity or service; or

(C) Allocating or dividing customers or markets, functional or geographic, for any commodity or service.

(2) A contract, combination or conspiracy between two or more persons whereby, in the letting of any public or private contract:

(A) The price quotation of any bid is fixed or controlled; or

(B) One or more persons submits a bid intending it to be higher than another bid and thus complementary thereto, submits a bid intending it to be substantially identical to another bid, or refrains from the submission of a bid.

(3) A contract, combination or conspiracy between two or more persons refusing to deal with any other person or persons for the purpose of effecting any of the acts described in subdivisions (1) and (2) of this subsection.

W. VA. CODE § 47-18-4

The establishment, maintenance or use of a monopoly or an attempt to establish a monopoly of trade or commerce, any part of which is within this State, by any persons for the purpose of excluding competition or controlling, fixing or maintaining prices is unlawful.

WIS. STAT. § 133.03

(1) Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce is illegal. Every person who makes any contract or engages in any combination or conspiracy in restraint of trade or commerce may be fined not more than $100,000 if a corporation, or, if any other person, may be fined not more than $50,000 or imprisoned for not more than 7 years and 6 months or both.

(2) Every person who monopolizes, or attempts to monopolize, or combines or conspires with any other person or persons to monopolize any part of trade or commerce may be fined not more than $100,000 if a corporation, or, if any other person, may be fined not more than $50,000 or imprisoned for not more than 7 years and 6 months or both.

(3) As an alternative to the criminal penalties for violation of this section, the department of justice or district attorney may bring an action for a civil forfeiture. In an action for a civil forfeiture under this subsection a corporation may be required to forfeit not more than $100,000 and any other person may be required to forfeit not more than $50,000.

(4) This section does not apply to ambulance service contracted for under §§ 59.54(1), 60.565, 61.64 and 62.133.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 00-5212 September Term, 1999
98cv01232

United States of America,
Appellee
v.
Microsoft Corporation,
Appellant.

United States Court of Appeals for District of Columbia Circuit
Filed Jun 13 2000
CLERK

BEFORE: Edwards, Chief Judge; Silberman*, Williams, Ginsburg, Sentelle, Henderson*, Randolph, Rogers, Tatel and Garland*, Circuit Judges

ORDER

In view of the exceptional importance of these cases and the fact that the number of judges of this court disqualified from participation as a practical possibility precludes any *en banc* rehearing of a panel decision, it is

ORDERED, *sua sponte*, by the *en banc* court that these cases and all motions and petitions filed in these cases be heard by the court sitting *en banc*. Parties shall hereafter file an original and nineteen copies of all pleadings and briefs submitted.

Per Curiam

FOR THE COURT:

/s/

Mark J. Langer, Clerk

* Circuit Judges Silberman, Henderson, and Garland took no part in the consideration and issuance of this order, and they will take no part in any future consideration of matters before the court involving these cases.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 00-5213 September Term, 1999
98cv01233

State of New York, *et al.*,
Appellee

v.

Microsoft Corporation,
Appellant.

United States Court of Appeals for District of Columbia Circuit
Filed Jun 13 2000
CLERK

BEFORE: Edwards, Chief Judge; Silberman*, Williams, Ginsburg, Sentelle, Henderson*, Randolph, Rogers, Tatel and Garland*, Circuit Judges

ORDER

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FOR THE COURT:

/s/

Mark J. Langer, Clerk

* Circuit Judges Silberman, Henderson, and Garland took no part in the consideration and issuance of this order, and they will take no part in any future consideration of matters before the court involving these cases.

(3)

No. 00-139

Supreme Court, U.S.
FILED
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In the Supreme Court of the United States

MICROSOFT CORPORATION, APPELLANT

v.

UNITED STATES OF AMERICA, ET. AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES IN RESPONSE TO THE JURISDICTIONAL STATEMENT

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45pp

QUESTIONS PRESENTED

Microsoft Corporation's statement of the questions presented (J.S. i-ii) identifies seven issues for review by this Court:

1. Whether the district court erred in holding that Microsoft violated Section 2 of the Sherman Act, 15 U.S.C. 2, by engaging in a course of exclusionary conduct to protect and maintain its personal computer (PC) operating system monopoly.

2. Whether the district court erred in holding that Microsoft violated Section 2 of the Sherman Act, 15 U.S.C. 2, by attempting to monopolize the market for Web browsers.

3. Whether the district court erred in holding that Microsoft violated Section 1 of the Sherman Act, 15 U.S.C. 1, by tying its Internet Explorer Web browser to its Windows operating system through contracts and technological artifices.

4. Whether any of the district court's procedural and evidentiary rulings constituted an abuse of discretion requiring reversal of the judgment.

5. Whether the district court abused its discretion by ordering structural separation of Microsoft into two entities and transitional restrictions on its conduct.

6. Whether the district court erred in dismissing Microsoft's counterclaim under 42 U.S.C. 1983, alleging that state attorneys general, under color of state law, sought relief in this case that would deprive Microsoft of its rights under federal copyright law.

7. Whether the district judge's extrajudicial comments about the case require reversal of the judgment.

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BRIEF FOR THE UNITED STATES IN RESPONSE TO THE JURISDICTIONAL STATEMENT

Because immediate consideration of this appeal is of general public importance in the administration of justice, the Solicitor General, on behalf of the United States, urges this Court to note probable jurisdiction under the Expediting Act of 1903, as amended, 15 U.S.C. 29(b).

STATEMENT

On May 19, 1998, the United States filed a civil complaint alleging that Microsoft Corporation has engaged in an anticompetitive course of conduct in violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C. 1, 2 (1994 & Supp. IV 1998). At Microsoft's request, the district court consolidated the case for all purposes with a similar case brought by 20 States and the District of Columbia. The district court conducted the proceedings expeditiously and, after a 78-day trial, entered its findings of fact (FF), App. 46-246, and its conclusions of law, App. 1-43. On the central issue in the case, the district court found that Microsoft had successfully engaged in a series of anticompetitive acts to protect and maintain its personal computer operating system monopoly, in violation of Section 2 of the Sherman Act. App. 3-21.

On June 7, 2000, the district court entered its final judgment. App. 253-279. That judgment requires Microsoft to submit a plan to reorganize itself into two separate firms and to comply with transitional injunctive provisions. *Ibid.* Microsoft filed notices of appeal. App. 280-283. Upon motion of the United States and the State plaintiffs, the district court concluded that Microsoft's appeal presents a matter "of general public importance in the administration of justice" and certified the case for direct appeal in accordance with the Expediting Act, 15 U.S.C. 29(b). At Microsoft's request, the district court stayed the judgment. See App. 284-285.

Microsoft opposes expedition of its own appeal. See J.S. 15-30. We submit, however, that direct appeal to this Court is warranted. In describing the case, we rely on the district court's factual findings, which "shall not be set aside unless clearly erroneous." Fed. R. Civ. P. 52(a). See *Anderson* v. *City of Bessemer City*, 470 U.S. 564, 573 (1985).[1]

1. Personal computers (PCs), including the familiar "Intel-compatible" PCs (see Add. B, *infra*, 7a), accomplish useful tasks, such as word processing, through the use of an operating system and applications programs. FF 1-4 (App. 47-48). An operating system is "a software program that controls the allocation and use of computer resources"; it serves as a "platform" for applications "by exposing interfaces, called 'application programming interfaces,' or 'APIs,'" that applications invoke. FF 2 (App. 47). Microsoft "possesses a dominant, persistent, and increasing share of the worldwide market for Intel-compatible PC operating systems." FF 35 (App. 60). That share "has stood above ninety percent" for a decade. *Ibid.* The "original equipment manufacturers" of PCs (OEMs) "uniformly are of a mind that there exists no commercially viable alternative" to Microsoft's Windows operating system. FF 54 (App. 70-71).

The Windows monopoly is protected by an "applications barrier to entry." FF 30-32, 36 (App. 58-60, 61). The pervasiveness of the Windows operating system induces developers to create vastly more applications for Windows than for other PC operating systems. The availability of a rich array of applications in turn "attracts consumers to Windows." FF 37 (App. 61-62). A competing operating system will not attract a large number of users unless those users believe that there is and will continue to be a sufficient

[1] For the Court's convenience, we have provided, as addenda to this brief, an index to the appendix that accompanies Microsoft's jurisdictional statement (Add. A) and a glossary defining frequently used terms (Add. B).

and timely array of applications for use on that operating system, FF 30-31, 37 (App. 58-59, 61-62), but software developers have little incentive to write applications for an operating system without a large number of users. FF 40-41 (App. 63-64).

This formidable entry barrier can be eroded through "middleware." A middleware program invokes the APIs of the operating system on which it runs, but also exposes its own APIs and thus can serve as a platform for other applications. FF 28 (App. 57). An application written to rely on a middleware program's APIs thus could run on all operating systems on which that middleware runs. FF 68 (App. 78). Applications developers would have incentives to write for widely used middleware, and so users would not be reluctant to choose an alternative operating system for fear that it would run an insufficient array of applications. FF 29, 68 (App. 57-58, 78).

Microsoft "was concerned with middleware" because middleware could severely weaken the applications barrier and threaten the dominance of Windows. FF 29, 68 (App. 57-58, 78). Microsoft particularly focused "on two incarnations of middleware that, working together, had the potential to weaken the applications barrier severely * * *. These were Netscape's Web browser [Navigator] and Sun's implementation of the Java technologies." FF 68 (App. 78); see also FF 69-77 (App. 78-82).

a. Within months after Netscape publicly released Navigator in December 1994, Navigator became the preeminent Web browser. FF 72 (App. 79-80). Because of the likelihood that Web browsers would become ubiquitous, and because Navigator also has middleware capabilities, Microsoft soon perceived Navigator as a threat to the applications barrier to entry that protected its Windows operating system monopoly. In May 1995, Microsoft Chief Executive Officer William Gates wrote that Netscape was "pursuing a multi-platform strategy where they move the key API into

the client [Web browser] to commoditize the underlying operating system." FF 72 (App. 80). Microsoft determined to eliminate the threat that Navigator would become a viable alternative platform for applications. FF 133, 142 (App. 108-109, 113-114).

Microsoft first tried to reach a "market allocation" agreement with Netscape. App. 21-22; FF 79-92 (App. 83-89). The proposed agreement would have required Netscape to stop its efforts to develop Navigator into "platform-level" (i.e., API-exposing) browsing software for the upcoming Windows 95 operating system in return for Microsoft's refraining from developing browser products for other operating systems. FF 83 (App. 85). Microsoft "warned" (FF 91 (App. 89)) Netscape that its access to critical technical information about Windows APIs—information that Netscape needed to make its browser run well on Windows 95 (FF 82 (App. 84-85))—depended on Netscape's acquiescence. FF 84, 90 (App. 85-86, 88-89). Had Netscape gone along with Microsoft's scheme, it would have become "all but impossible" for Navigator or any other browser rival to pose a platform threat to Windows. FF 88-89 (App. 87-88). Netscape, however, refused to agree to Microsoft's proposal, FF 88, 91 (App. 87, 89), and Microsoft then withheld important technical information needed by Netscape. FF 91-92 (App. 89).

Microsoft understood that large numbers of developers would write to the APIs exposed by Navigator only if they believed Navigator would become "the standard" Web browser, FF 133 (App. 108), and that, if developers expected Microsoft's own browser, Internet Explorer (IE), to attract a large share of usage, they would continue to focus their efforts on the Windows platform, *ibid.* Microsoft therefore decided to engage in a multifaceted campaign to maximize IE's share of usage and minimize Navigator's. FF 133 (App. 109). Between 1995 and 1999 Microsoft spent more than $100 million each year and increased to more than a thou-

sand the number of developers working on IE, FF 135 (App. 109), even though Microsoft has given IE away free since its release in July 1995, FF 137 (App. 111). In addition, Microsoft decided "to constrict Netscape's access to the distribution channels that led most efficiently to browser usage" (FF 143 (App. 115))—installation by OEMs on new PCs and distribution by Internet access providers (IAPs) such as America Online. FF 144-145 (App. 115-116). Because "no other distribution channel for browsing software even approaches the efficiency" of those two channels, FF 145 (App. 116), Microsoft sought to "ensure that * * * OEMs and IAPs bundled and promoted Internet Explorer to the exclusion of Navigator," FF 148 (App. 117).

Microsoft's campaign to foreclose Netscape from the OEM channel involved a "massive and multifarious investment" in a "complementary set of tactics": (1) contractual restrictions forcing OEMs to take IE with Windows 95 and 98 and forbidding them from removing or obscuring it; (2) "additional technical restrictions to increase the cost of promoting Navigator"; (3) exchanging valuable incentives for OEMs' commitments to promote IE exclusively; and (4) threats to "penalize individual OEMs that insisted on pre-installing and promoting Navigator." FF 241 (App. 160-161).

Microsoft's contractual bundling of IE and Windows conflicted with the interests of its OEM customers and browser users, for "Web browsers and operating systems are separate products," FF 154 (App. 119), and "[m]any consumers desire to separate their choice of a Web browser from their choice of an operating system," FF 151 (App. 118). Nevertheless, by July 1995, Microsoft had concluded that bundling Windows 95 and IE, contrary to its initial plan, FF 156 (App. 120), was the "most effective way" to diminish Navigator's threat to the operating system monopoly. FF 157 (App. 120). Its OEM licenses required that OEMs not delete or modify any part of what Microsoft defined to be "Windows," including IE, FF 158 (App. 120), even by using

the "Add/Remove" capability Microsoft included in Windows 95 and promoted to users. FF 165, 175-176 (App. 123, 128-129). OEMs acquiesced, even though that prevented them from meeting consumer demand for PCs without IE, because "they had no commercially viable alternative to pre-installing Windows 95 on their PCs." FF 158 (App. 120-121). Microsoft's licensing requirement had no technical justification, FF 175-176 (App. 128-129), and "guaranteed the presence of [IE] on every new Windows PC system," FF 158 (App. 121). Microsoft "knew that the inability to remove [IE] made OEMs less disposed to pre-install Navigator onto Windows 95." FF 159 (App. 121).

Despite those contractual restraints, Microsoft officials believed they were not "going to win" the browser war simply by "[p]itting browser against browser," FF 166 (App. 124), so they decided to make technical changes in Windows 98 to ensure that removing IE from Windows is difficult and "running any other browser is a jolting experience." FF 160 (App. 122).[2] Unlike Windows 95, Windows 98 thus did not allow even users to "uninstall" IE with the Add/Remove feature, although Gateway, a major OEM, had expressly requested such a feature, and although users were permitted to uninstall numerous other features that Microsoft held out

[2] Microsoft Senior Vice President James Allchin complained to Group Vice President Paul Maritz that "[w]e are not leveraging Windows from a marketing perspective * * * . [W]e are not investing sufficiently in finding ways to tie IE and Windows together." FF 166 (App. 124-125). In Allchin's view, "[t]reating IE as just an add-on to Windows which is cross-platform [means] losing our biggest advantage—Windows marketshare." FF 166 (App. 123-124). Maritz agreed and, to "combat" Netscape, FF 168 (App. 125), decided to delay the release of Windows 98 until IE 4.0 could be bound with it, "even if OEMs suffer[ed]" by missing important seasonal sales opportunities. FF 167 (App. 125). That decision "delayed the debut of numerous features * * * that Microsoft believed consumers would find beneficial, simply in order to protect the applications barrier to entry." FF 168 (App. 126).

as integrated into Windows 98. FF 170 (App. 126-127). Binding IE to Windows 98 also produces "unpleasant consequences for users" of Navigator, FF 172 (App. 127), because it can "override the user's choice" of browsers and require even Navigator users "to employ [IE] in numerous situations that, from the user's perspective, are entirely unexpected." FF 171 (App. 127). There is no technical justification for that binding.[3]

Despite those technical obstacles, Microsoft still feared that OEMs might install Navigator in addition to IE and might even configure the icons on the initial computer screen, and arrange the boot (start-up) sequence, to promote the use of Navigator rather than IE. FF 202-203 (App. 139-140). Microsoft thus "threatened to terminate the Windows license of any OEM" that did so or added "programs that promoted third-party software to the Windows 'boot' sequence." FF 203 (App. 140); see also FF 206, 208 (App. 141-142). Microsoft's tactics "soured" its relations with OEMs generally and also "stymied innovation that might have made Windows PC systems more satisfying to users. Microsoft would not have paid this price had it not been convinced that its actions were necessary to ostracize Navigator from the vital OEM distribution channel." FF 203 (App. 140).[4]

[3] Microsoft "could offer consumers all the benefits of the current Windows 98 package by distributing the products separately and allowing OEMs or consumers themselves to combine the products if they wished." FF 191 (App. 134); see also FF 187-193 (App. 133-136). Microsoft's technical binding of IE made OEMs even less likely to install Navigator on their PCs. FF 172 (App. 127).

[4] Furthermore, although IE was a "no revenue" product, FF 142 (App. 114), Microsoft nevertheless offered OEMs valuable incentives and discounts "to promote [IE] and, in some cases, to abstain from promoting Navigator," FF 139, 231-234 (App. 112, 155-157). Together with the other components of its campaign to foreclose the OEM channel to Netscape, these measures required Microsoft to pay out "huge sums of money, and

Microsoft "largely succeeded in exiling Navigator from the crucial OEM distribution channel." FF 239 (App. 159). By January 1998, Microsoft executive Joachim Kempin was able to report to CEO Gates and others that Navigator was being shipped through only four of the 60 OEM distribution sub-channels. FF 239 (App. 160). Even then, Navigator was most often in a position "much less likely to lead to usage" than IE's position. *Ibid.* Within a year, "Navigator was present on the desktop of only a tiny percentage of the PCs that OEMs were shipping." *Ibid.*

Microsoft's strategy for foreclosing Netscape from the other crucial channel of distribution, Internet access providers that provide browser software to their customers, FF 242 (App. 161-162), similarly involved both huge expenditures and substantial sacrifices of revenue that made no business sense except as a way of protecting the applications barrier to entry. FF 139, 247 (App. 111-112, 163). Microsoft "believed that, if IAPs gave new subscribers a choice between [IE] and Navigator, most of them would pick Navigator." FF 243 (App. 162). Accordingly, Microsoft gave IAPs valuable incentives to promote and distribute IE and to inhibit promotion and distribution of Navigator. FF 139 (App. 112). Its actions, which "sealed off a major portion of the IAP channel from the prospect of recapture by Navigator," FF 247 (App. 164), "had, and continue to have, a substantial exclusionary impact," FF 308 (App. 194).[5]

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sacrifice[] many millions more in lost revenue every year." FF 139 (App. 111). The campaign was "only profitable to the extent that it protected the applications barrier to entry" and so preserved the operating system monopoly. FF 141 (App. 113).

[5] For example, Microsoft exchanged valuable promotional placement on the Windows desktop for the leading IAPs' agreement to distribute Navigator to no more than 15%-25% of their subscribers even when more of them wanted Navigator, to refrain from promoting Navigator, and even to refrain from mentioning to subscribers that they could use a browser other than IE. FF 244-245, 258 (App. 162-163, 168-169). Microsoft also

Microsoft's resulting control of the two distribution channels through which "a very large majority of those who browse the Web obtain their browsing software," FF 144 (App. 115), together with its other efforts to protect the applications barrier, caused browser usage shares to "change[] dramatically in favor of [IE]." FF 360 (App. 220). This prevented Navigator from becoming "an attractive enough platform * * * to weaken the applications barrier to entry." FF 378 (App. 229).[6] Microsoft's numerous and varied actions against Navigator "'would not be considered profit maximizing except for the expectation that . . . the entry of potential rivals' into the market for Intel-compatible PC operating systems will be 'blocked or delayed.'" App. 20 (citation omitted); see also FF 136-142 (App. 110-114).

b. Microsoft also feared another middleware technology—Sun Microsystems' Java—a programming language with related middleware that enables applications "written in Java" to run on different operating systems. FF 73-74 (App. 80-81). Java technology threatened to erode the applications barrier to entry, FF 75-77 (App. 81-82), and Microsoft sought to extinguish the Java threat by "maximizing the difficulty with which applications written in Java could be ported [i.e., adapted] from Windows to other platforms, and vice versa." FF 386 (App. 232).

Microsoft induced the development of Java programs that performed well on Windows but would not run on other operating systems without significant modifications. FF

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gave IAPs financial incentives. FF 246 (App. 163). Microsoft "invested [these] great sums, and sacrificed potential sources of revenue, with the sole purpose of protecting the applications barrier to entry." FF 308 (App. 194); see also FF 247 (App. 163-164).

[6] Microsoft improved IE over time, but it still recognized in May 1998 that "IE4 is fundamentally not compelling" and "[n]ot differentiated from Netscape v[ersion]4—seen as a commodity." Thus, "superior quality was not responsible for the dramatic rise [in IE's] usage share." FF 375 (App. 227).

387-394 (App. 232-236). Microsoft, like others, developed a "Java Virtual Machine" (JVM) for the Windows operating system. FF 388 (App. 233). A JVM is a computer program that translates Java-based programs into instructions that the operating system can understand and execute. FF 73 (App. 80); see Add. B, *infra*, 8a. Microsoft's JVM and developer tools incorporated Windows-specific features in a way that makes a Java program designed to rely on those features more difficult to port to another operating system. FF 388-390 (App. 233-234). Microsoft took steps to ensure that developers would write Java programs that used those features; it conditioned early access to Windows technical information on using Microsoft's JVM as the default, FF 401 (App. 239), and it failed to warn applications developers about the porting consequences of reliance on Windows-specific features of its development tools, FF 394 (App. 235-236). Microsoft undertook other actions to discourage developers from creating Java applications compatible with non-Microsoft JVMs, and those actions made no business sense except as a means of protecting the applications barrier to entry. FF 388-394, 401-404, 406 (App. 233-236, 239-242).[7]

Microsoft's avowed aim was not to innovate, or to give consumers a better product; it directly acted to prevent Sun

[7] Microsoft's determination to cripple Sun's cross-platform Java was related to its actions against Netscape's Navigator. FF 77 (App. 82). In May 1995, Netscape announced that it would include a Sun-compliant Windows JVM with every copy of Navigator, creating the possibility that Sun's Java implementation "would achieve the necessary ubiquity on Windows" to pose a threat to the applications barrier to entry. FF 395 (App. 237). Microsoft responded not only by restricting distribution of Navigator and bundling its own JVM with IE, but also by pressuring Intel, which was developing a high-performance Windows-compatible JVM, not to "share its work with either Sun or Netscape, much less allow Netscape to bundle the Intel JVM with Navigator." FF 396-397 (App. 237-238); see also FF 405 (App. 241).

from creating Java APIs, and, as Microsoft executive Eric Engstrom put it, "especially ones that run well * * * on Windows." FF 406 (App. 242). Microsoft ultimately succeeded in impeding Java's ability to weaken the applications barrier to entry with a series of actions "whose sole purpose and effect were to do precisely that." FF 407 (App. 243). Microsoft pursued its "dedication to the goal of protecting the applications barrier to entry" despite "the fact that its efforts to create incompatibility between its JVM and others resulted in fewer applications being able to run on Windows than otherwise would have." *Ibid.*

2. Based on the conduct described above, along with numerous other instances of predatory and exclusionary conduct detailed in other findings, see, *e.g.*, FF 93-132 (App. 89-108), the district court found that, "[t]o the detriment of consumers," Microsoft had undertaken a coordinated series of actions "designed to protect the applications barrier to entry, and hence its monopoly power, from a variety of middleware threats." FF 409 (App. 244).[8] The district court entered conclusions of law holding that Microsoft violated Section 2 of the Sherman Act by engaging in anticompetitive acts to maintain its operating system monopoly, App. 3-21, and that it had committed other violations of antitrust law, App. 21-42.[9]

[8] Microsoft's anticompetitive campaign "has retarded, and perhaps altogether extinguished, the process by which these two middleware technologies could have facilitated the introduction of competition into an important market." FF 411 (App. 246). Furthermore, "Microsoft has demonstrated that it will use its prodigious market power and immense profits to harm any firm that insists on pursuing initiatives that could intensify competition against one of Microsoft's core products. * * * The ultimate result is that some innovations that would truly benefit consumers never occur for the sole reason that they do not coincide with Microsoft's self-interest." FF 412 (App. 246).

[9] The court concluded that Microsoft violated Section 2 of the Sherman Act by attempting to monopolize the market for Web browsers, App.

The district court thereafter entered its final judgment, which requires Microsoft to submit a plan to reorganize itself into two separate firms ("OpsCo" to receive the operating system business and "AppsCo" to receive the rest) and to comply with transitional injunctive provisions.[10] App. 253-257. The court found that a structural remedy is "imperative," App. 249, and that the government's plan addressed "all the principal objectives of relief in such cases," App. 251. The court found Microsoft's alternative proposal "plainly inadequate." *Ibid.* This appeal followed.[11]

21-24, and Section 1 of the Sherman Act by tying its Web browser to its operating system, App. 25-33. The court found that the conduct that violated the Sherman Act also violated various state laws. App. 39-42. The court rejected the United States' claim that Microsoft's exclusive dealing contracts violated Section 1 of the Sherman Act, but it did so on the basis of its analysis of effects in the Web browser market. App. 34-39. The court recognized that those contracts contributed, however, to Microsoft's maintenance of the operating system monopoly. App. 38. Although we disagree with the legal standard that the court arguably applied to the exclusive dealing claim, the United States has had no occasion to seek further review of the court's exclusive dealing ruling because the court has effectively terminated the unlawful practices as part of its Section 2 remedy. See note 10, *infra*.

[10] The final judgment, inter alia, requires Microsoft to treat major OEMs uniformly in licensing its operating system (¶ 3(a)(ii) (App. 260-261)) and to disclose the same technical and interface information to software and hardware developers that its own software developers use (¶ 3(b) (App. 262-263)). It prohibits adverse action against OEMs based on OEM decisions to use or promote products that compete with Microsoft products (¶ 3(a)(i) (App. 259-260)); bans exclusive dealing agreements that restrict third parties from using or promoting competing products (¶ 3(e) (App. 264)); and bans contractual tying and binding of certain middleware to its operating system (¶ 3(f) and (g) (App. 265-266)). Those provisions remain in effect for three years after implementation of divestiture. ¶ 3 (App. 259).

[11] On June 13, 2000, Microsoft appealed to the court of appeals, App. 280, 282, which the same day ordered the case to be heard en banc, App. 311-312. On June 20, 2000, the district court determined that the final judgment should be appealed directly to this Court under the Expediting

ARGUMENT

The Expediting Act expressly provides for direct appeal to this Court in that rare instance in which immediate consideration of an appeal in a civil injunctive antitrust case brought by the United States is of "general public importance in the administration of justice." 15 U.S.C. 29(b). This is such a case. The suit has immense importance to our national economy. It is especially important to the rapidly developing high-technology sectors, which need to know how they will be affected by the remedies resulting from this case and, more generally, how this Court's antitrust jurisprudence applies to a dominant firm in their marketplace. The public interest requires prompt and final resolution of the issues on appeal, both so that effective remedies can be put in place to restore competitive conditions and protect consumers and so that the computer and software industries can plan for the future. The findings of fact are cogent and complete, and the legal issues are ready for this Court's review. The Court should note probable jurisdiction.

I. This Case Warrants The Court's Immediate Consideration Because The Appeal Is Of "General Public Importance In The Administration Of Justice"

From 1903 to 1974, this Court directly reviewed all appeals in civil injunctive antitrust cases brought by the United States. See Expediting Act of 1903, ch. 544, 32 Stat. 823. Over time, Congress determined that direct appeal in all such cases posed an unnecessary burden on this Court. In 1974, Congress gave the courts of appeals jurisdiction over routine appeals. See 15 U.S.C. 29(a). At the same time,

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Act and, as requested by Microsoft, stayed the final judgment in its entirety pending appeal. App. 284-285. The court of appeals immediately suspended its proceedings in the case.

Congress gave this Court discretion to hear a direct appeal if the district court certified, at the request of any party, that "immediate consideration of the appeal by the Supreme Court is of general public importance in the administration of justice." 15 U.S.C. 29(b).

This Court should exercise its discretion under 15 U.S.C. 29(b) in light of Congress's expressed desire to preserve direct appeals in that limited situation. Congress relieved the Court of the task of reviewing routine antitrust appeals, but Congress concluded, as a matter of national policy, that the Court should continue to decide direct appeals "where the underlying antitrust judgment involves matters of great and general importance to the public interest because of their 'impact on the economic welfare of this nation.'" *United States* v. *Western Elec. Co.*, 1983-2 Trade Cas. (CCH), ¶ 65,596, at 68,971 (D.D.C. 1983) (quoting H.R. Rep. No. 1463, 93d Cong. 2d Sess. 14 (1974)).[12]

[12] The legislative history of the 1974 Expediting Act amendments reveals that the Senate and the House disagreed over whether the Attorney General or the district court should be responsible for certifying that the case is of "general public importance," but both chambers agreed that the Court would be the final judge of that matter and expected that the Court would accept review if it agreed that the case satisfied that standard. See generally H.R. Rep. No. 1463, *supra*, at 12-14; S. Rep. No. 298, 93d Cong., 1st Sess. 3-4, 7-8 (1973); 120 Cong. Rec. 38,583-38,587 (1974); 119 Cong. Rec. 24,599 (1973). The House acceded to the Senate proposal, which empowered the district court to certify and expressly acknowledged the Court's "discretion" to accept or deny review. See 120 Cong. Rec. 39,123-39,124 (1974). As the Senate floor manager noted, the Senate proposal differed from the House proposal "only in the way the [certification] decision is made." *Id.* at 38,585. The legislative history also reveals that Congress understood that the "general public importance" standard reaches cases affecting "the economic welfare of this nation." H.R. Rep. No. 1463, *supra*, at 14; see also S. Rep. No. 1214, 91st Cong., 2d Sess. 4 (1970) (letter of Attorney General Mitchell to the Vice President) (such appeals "will usually involve novel legal questions pertaining to the interpretation or enforcement of the antitrust laws or may have serious

Congress's grant of jurisdiction under the Expediting Act differs fundamentally from, and operates in addition to, Congress's open-ended grant of certiorari jurisdiction under 28 U.S.C. 1254. The Expediting Act, unlike the certiorari statute, is limited by subject matter and requires district court certification. See 15 U.S.C. 29(b). But most importantly, it provides the Court with an express standard —"general public importance in the administration of justice"—to guide the Court's exercise of discretion. The purpose of the amended Act remains to "[e]xpedit[e]" the final resolution by this Court of cases meeting that standard. Congress plainly intended that the Court would decide whether to accept review based on the appeal's practical consequences for the national economy and the needs of effective antitrust enforcement—not on whether the Court would normally grant certiorari (or certiorari before judgment) in such a case. See Robert L. Stern et al., *Supreme Court Practice* § 2.7, at 53 (7th ed. 1993) ("Whether a case warrants direct review under § 29(b) turns on the importance of a prompt decision by the Court, not on the general significance of the legal issues presented.").

The United States recognizes that the need for direct appeal arises infrequently and does not lightly seek it. The United States has invoked the Expediting Act's direct review provisions in only two previous instances in the past 26 years. Those requests both arose from *United States* v. *Western Electric Co.*, *supra*, a Sherman Act suit against AT&T and its subsidiaries that bears close similarities to this case. In each instance, the Court accepted direct review. See *California* v. *United States*, 464 U.S. 1013 (1983); *Maryland* v. *United States*, 460 U.S. 1001 (1983).

The *California* and *Maryland* appeals arose from intervenor challenges to the AT&T consent decree, which re-

legal or economic consequences going beyond the mere private interests of the individual litigants").

quired AT&T to divest assets and restructure its operations.[13] Like the appeal in this case, the appeals in *California* and *Maryland* involved a government enforcement action against an "overwhelmingly dominant firm" in an important market and had resulted in a "structural remedy" to prevent abuse of monopoly power and "further the public interest in competition." 82-952 MA, at 13; see 83-737 MA, at 10-11. The United States urged the Court to hear the appeals, stating that "[w]hether a case warrants direct review * * * turns on the importance of a prompt decision of the case by this Court." 82-952 MA, at 10-11. The United States explained that "delay in resolving the validity of the decree will have a broad and significant adverse impact on the telecommunications industry, on related industries including data processing, and thus on the public in general." 82-952 MA, at 12; see also 83-737 MA, at 8-11.[14]

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[13] See *Western Elec.*, 569 F. Supp. 1057; 552 F. Supp. 131. See also *Maryland*, 460 U.S. at 1001 (Rehnquist, J., dissenting); 82-952 et al., Motion of the United States to Affirm (82-952 MA) at 2-9; 83-737 et al., Motion of the United States to Affirm (83-737 MA) at 2-7; *Supreme Court Practice*, *supra*, at 54.

[14] Microsoft offers nothing to support its supposition that the Court accepted those appeals solely because (1) they "involved a negotiated consent decree"; (2) they "raised narrow legal questions" that the Court could resolve summarily; and (3) "AT&T supported immediate consideration." J.S. 26. The Court did not explain its reasons for accepting the direct appeal, but it is reasonable to presume that the Court relied on the Expediting Act's express criterion. The Act is clearly not limited to cases that involve a "consent decree" or "narrow legal questions" that are susceptible of summary disposition. The United States noted that e "issues raised by appellants are particularly suited to expedited direct review" (82-952 MA, at 16), but the United States did not suggest that that factor was a controlling consideration (see *id.* at 10-15). There is also no reason to believe that the defendant's support for direct review was a decisive factor. AT&T expressly supported direct review because the corporation had an interest in prompt resolution of the issues. See 82-952 Motion of AT&T to Affirm at 16-17. In this case, Microsoft, which has the benefit of a stay, apparently sees value in delay.

This case, like the *California* and *Maryland* appeals, clearly satisfies the Expediting Act's "general public importance" standard. The district court has determined that Microsoft, one of the Nation's largest companies and the dominant participant in the Intel-compatible PC operating system market, has taken unlawful actions to maintain its monopoly in that market. The court's remedy will directly impact competition in that important market and other related sectors, which in turn will directly affect the information-processing choices of virtually every computer user, including virtually every business and governmental entity, as well as hundreds of millions of consumers worldwide. In addition, the pendency of the appeal will likely affect Microsoft's workforce and its relations with other computer and software entities that form the burgeoning high-technology sectors of the economy.[15]

Microsoft itself has acknowledged the significance of this case to the Nation's economy. See, *e.g.*, J.S. 28. Indeed, Microsoft recently told the court of appeals that the district court's judgment may cause "the entire United States economy [to] * * * suffer." Microsoft Motion For Stay Pending Appeal 37 (D.C. Cir. June 13, 2000) (No. 00-5212). Recognizing "the exceptional importance" of the case, the court of appeals took the extraordinary step of ordering en banc consideration within an hour of the filing of Microsoft's notices of appeal. See J.S. 13; App. 311-312. To be sure, the court of appeals has taken steps within *its* power to expedite the appeal. But Congress has concluded that, in cases of "general public importance," those steps are not enough. The Expediting Act provides a mechanism, beyond the mea-

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[15] See, *e.g.*, Microsoft Memorandum in Support of Motion for Summary Rejection of the Government's Breakup Proposal 5-6 (May 10, 2000) ("Not only may Microsoft lose irreplaceable employees, but third parties may be unwilling to enter into routine business agreements with Microsoft while its continued corporate existence remains in doubt").

sures available to the court of appeals, that should be utilized here.

Expedition is justified for a related reason as well. At the same time that the district court certified the case as one of general public importance, it also stayed its judgment pending appeal. App. 285. Prompt resolution of the appeal is therefore critical to effective federal and state antitrust enforcement. Microsoft steadfastly maintains that everything it has done was legal, see App. 249, so it likely will continue such conduct until the judgment goes into effect, *ibid.* Delay will postpone, and likely complicate substantially, the restoration of competition in the affected high-technology industries, which evolve at an extraordinary pace. Moreover, prolonged uncertainty about the outcome of this case creates significant inefficiencies. No firm in the affected industries can confidently plan or commit resources until it knows whether or when the final judgment will take effect.

In sum, all agree—and the evidence establishes—that the stakes in this case for the national economy are immense. If this case does not qualify for direct review under the Expediting Act, it is difficult to imagine what future case would.[16]

II. Microsoft's Contentions That The Court Should Deny The Appeal, Despite Its Importance, Are Unpersuasive

This case epitomizes the exceptionally important public antitrust case for which Congress has preserved direct review under the Expediting Act. For that reason alone, the

[16] Indeed, Microsoft does not contest the practical importance of its appeal. See J.S. 30. Rather, citing pre-1974 cases, Microsoft contends (J.S. 24-29) that the Court should ignore—effectively nullify—the amended statutory standard in a major category of cases to which the Act undeniably applies, by adopting a general policy of denying all direct appeals in contested cases under the Expediting Act.

Court should note probable jurisdiction. But even if the Court accepts Microsoft's invitation to look beyond the importance of the case and the consequent need for immediate resolution, Microsoft's rationales for denying direct review are not convincing. Microsoft essentially argues that this case is too legally and factually complex for this Court's review. J.S. 16-23. But this Court regularly decides complex cases, and, from 1903 to 1974, the Court routinely decided all such antitrust appeals. Congress has relieved the Court of that routine chore. The Court will not be unduly burdened by undertaking to resolve the singularly important appeal in this case—the first such appeal in 17 years.

A. The Legal Issues Are Appropriate For Direct Appeal. Microsoft argues that the legal issues it intends to raise are too complex and numerous for direct review. J.S. 19-23. Microsoft, however, overstates the complexity of this case, underestimates this Court's capabilities, and disregards the responsibility of *counsel* to "clear out"—rather than cultivate—"procedural and factual underbrush" (J.S. 23).[17]

Viewed realistically, Microsoft's appeal would require the Court to make, at most, five inquiries: whether the district court properly applied this Court's antitrust decisions respecting (1) monopoly maintenance, (2) attempted monopolization, and (3) tying; and whether the district court

[17] The Court regularly deals with legal issues that involve complex subject matter under its certiorari jurisdiction, *e.g.*, *AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366 (1999) (validity of regulations implementing the Telecommunications Act of 1996), and on direct appeal, *e.g.*, *United States Dep't of Commerce* v. *Montana*, 503 U.S. 442 (1992) (statistical techniques for apportionment). Furthermore, Microsoft's appeal—whether it proceeds in this Court or in the court of appeals—is unlikely to involve the number of inquiries that Microsoft projects. See J.S. 21-23 (cataloguing a non-exhaustive list of 19 issues). Imaginative appellate counsel can compile a long list of possible issues in almost any case, but the appellate process demands that counsel identify and limit themselves to questions that are worthy of the appellate court's consideration.

abused its discretion (4) in expediting the trial and admitting evidence, and (5) in selecting a remedy. See J.S. i-ii.[18] This Court is no less capable than the court of appeals of deciding those matters. And unlike the court of appeals, this Court can *dispositively* resolve the appeal and vindicate the enormous public interest in swift resolution of the case.

1. The central issue in this case is whether Microsoft violated Section 2 of the Sherman Act by engaging in a course of exclusionary conduct to protect and maintain its PC operating system monopoly. As this Court's decisions explain, the proscribed practice of monopolization is the willful acquisition or maintenance of monopoly power by the use of anticompetitive means "to foreclose competition, to gain a competitive advantage, or to destroy a competitor." *Eastman Kodak Co.* v. *Image Technical Servs., Inc.*, 504 U.S. 451, 482-483 (1992) (quoting *United States* v. *Griffith*, 334 U.S. 100, 107 (1948)). This Court has described such conduct as "exclusionary" and "predatory." *Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.*, 472 U.S. 585, 602 (1985). If there are no "valid business reasons" for conduct that tends to impair the opportunities of a monopolist's rivals, it is exclusionary. See *Eastman Kodak*, 504 U.S. at 483; *Aspen*, 472 U.S. at 605 & n.32 (quoting 3 Phillip Areeda & Donald F. Turner, *Antitrust Law* ¶ 626b at 78 (1978)); see also, *e.g.*, *Neumann* v. *Reinforced Earth Co.*, 786 F.2d 424, 427 (D.C. Cir.) (Bork, J.), cert. denied, 479 U.S. 851 (1986).

The district court applied that standard (App. 6-8) to its findings of fact (App. 51-246), which describe a textbook example of monopoly maintenance (App. 9-21). See pp. 2-11,

[18] Microsoft's statement of the questions presented also includes a challenge to the district court's rejection of Microsoft's civil rights counterclaim against the state attorneys general, App. 42-43, and its suggestion that the district court's decision should be reversed on the basis of the judge's statements to the press. J.S. i-ii. Although Microsoft is free to raise those issues, they are not substantial questions that would warrant any significant expenditure of a reviewing court's time.

supra. The district court was accordingly correct in concluding that Microsoft has violated Section 2. The district court properly determined that Microsoft had monopoly power in a relevant market. App. 3-6. The court also concluded that Microsoft has engaged in a broad-ranging course of predatory conduct in which Microsoft sacrificed current wealth and opportunities to "perpetuate the applications barrier to entry" that protected its monopoly power. See App. 6-21. The court's decision on monopoly maintenance cogently addresses the relevant considerations and frames the issues for this Court's review. Indeed, the court explicitly addressed and rejected the arguments respecting monopoly maintenance that Microsoft proposes to raise on appeal. Its decision accordingly provides a systematic guide for addressing those arguments on appeal. App. 4-20.[19]

2. The district court's monopoly maintenance ruling is sufficient to establish liability and support all the relief in the final judgment. The district court additionally ruled, however, that Microsoft has violated Section 2 of the Sherman Act by unlawfully attempting to monopolize the market for Web browsers. App. 21-24. The court correctly stated that liability for attempted monopoly will attach if the plaintiff proves: "(1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize" and (3) that there is a "dangerous probability" that the defendant will succeed in achieving monopoly power. App. 21 (quoting *Spectrum Sports, Inc.* v. *McQuillan*, 506 U.S. 447, 456 (1993)). The court properly ruled that the

[19] Compare J.S. 21-22 (raising questions of market definition, barriers to entry, monopoly power, anticompetitive conduct, and causation), with App. 4 (market definition); App. 5 (existence of the applications barrier to entry); App. 5-6 (Microsoft's possession of market power); App. 6-9 (definition of proscribed anticompetitive acts); App. 9-19 (description of specific instances of anticompetitive conduct); App. 19-20 (identification of Microsoft's "single, well-coordinated course" of anticompetitive action).

plaintiffs proved each of those elements. App. 21-24. As in the case of the monopoly maintenance claim, the court addressed Microsoft's specific objections, and the attempted monopolization claim is therefore also well postured for this Court's review. App. 21-24.[20]

3. The district court also ruled, on another matter that is not necessary to support the prescribed relief, that "Microsoft's combination of Windows and [IE] by contractual and technological artifices constitute[s] unlawful tying to the extent that those actions forced Microsoft's customers and consumers to take [IE] as a condition of obtaining Windows." App. 25. The district court acknowledged that its conclusion "is arguably at variance" with the court of appeals' prior decision in *United States* v. *Microsoft Corp.*, 147 F.3d 935 (D.C. Cir. 1998). App. 25. But the court concluded that the relevant passages of the court of appeals' decision, which dealt only with obligations under a consent decree, were dicta and did not control this Sherman Act case. App. 26. The court additionally concluded that this Court's decisions in *Eastman Kodak* and *Jefferson Parish Hospital District No. 2* v. *Hyde*, 466 U.S. 2 (1984), support its conclusion that Microsoft unlawfully tied its products. App. 27-33. If Microsoft intends to dispute the district court's understanding of this Court's decisions—or seeks a special exception from those decisions—then this Court provides the proper forum in which to address that matter. See, *e.g.*, *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989).

4. Microsoft argues that the district court unduly expedited the proceedings in this case and improperly admitted, at the bench trial, hearsay evidence. J.S. 21. Resolution of those matters would not significantly burden the Court. A

[20] Compare J.S. 22 (raising questions respecting specific intent and probability of success), with App. 21-22 (proof of specific intent); App. 22-24 (proof of a "dangerous probability of success").

"trial court is endowed with great discretion to make decisions concerning trial schedules," *United States* v. *Taylor*, 487 U.S. 326, 343 (1988), and Microsoft must demonstrate that the court's scheduling actions in this case amount to an abuse of discretion. Microsoft has failed to identify an action that would constitute an abuse.[21] Similarly, a judge does not commit reversible error in admitting hearsay in a bench trial unless the judge improperly relies on that evidence. See *United States* v. *Matlock*, 415 U.S. 164, 175 (1974); *Multi-Medical Convalescent & Nursing Ctr.* v. *NLRB*, 550 F.2d 974, 977 (4th Cir. 1977), cert. denied, 434 U.S. 835 (1977). The district court stated repeatedly that it would assess hearsay evidence to determine what weight, if any, to give it. See, *e.g.*, Tr. 10:9-11 (2/11/99 am); Tr. 5:21-24, 10:19-23 (1/25/99 pm); Tr. 4:21-5:3 (10/20/98 pm). In so doing, the court acted well within its discretion. Microsoft has not identified any finding of fact supported only by inadmissible hearsay.

5. Microsoft's proposed challenge to the district court's remedy (J.S. 11-12, 23) presents a matter that ought to be decided by this Court, rather than the court of appeals, in

[21] Microsoft objects that the district court limited discovery to five months (J.S. 5-6, 21), but it is essential—if the antitrust laws are to be enforced efficiently and effectively in high-technology industries—that courts at all levels expedite important antitrust litigation. Microsoft has specified no prejudice to it from the discovery schedule. The pre-trial schedule was issued pursuant to a joint proposed scheduling order. Scheduling Order at 2 (Aug. 20, 1998). The district court fixed no upper limit to the number of interrogatories Microsoft could serve or depositions it could take, Pretrial Order No. 1, at 2 (June 12, 1998), and Microsoft has not explained how, in light of its virtually unlimited resources, its ability to conduct discovery was constrained. Microsoft's related assertion that the district court permitted plaintiffs to "broaden their case dramatically" (J.S. 21) simply ignores the complaint and the pretrial record. The Section 2 monopoly maintenance claim has been in the case from the outset, see, *e.g.*, Compl. ¶¶ 13, 36, 38, 98, 122, 138-139, and was the principal focus of the government's discovery and proof at trial.

light of the extraordinary public and private interests at stake. The task is an important one, but it is facilitated, to a considerable extent, by the applicable standard of review. District courts "are invested with large discretion to model their judgments to fit the exigencies of the particular case," *International Salt Co.* v. *United States*, 332 U.S. 392, 400-401 (1947), and this Court has long held that it "will not direct a recasting of the decree except on a showing of abuse of discretion." *United States* v. *Crescent Amusement Co.*, 323 U.S. 173, 185 (1944).[22]

In examining the remedy, the Court would obtain considerable assistance from the district court's cogent and thorough findings. The court found that Microsoft engaged in a pattern of predatory activity directed at innovations that threatened its monopoly. See App. 19-21. Its "corporate practice [has been] to pressure other firms to halt software development that either shows the potential to

[22] The established standards for antitrust relief also provide guidance. Relief in a Sherman Act case must (i) end the unlawful conduct, (ii) prevent its recurrence, and (iii) undo its anticompetitive consequences. See *National Soc'y of Prof'l Eng'rs* v. *United States*, 435 U.S. 679, 697 (1978); *Ford Motor Co.* v. *United States*, 405 U.S. 562, 573 (1972); *United States* v. *E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 326 (1961). The district court unquestionably had power to order divestiture in this Section 2 case. See, *e.g.*, *United States* v. *United Shoe Mach. Corp.*, 391 U.S. 244 (1968) (reversing denial of petition for divestiture). "[C]ourts are authorized, indeed required, to decree relief effective to redress the violations, whatever the adverse effect of such a decree on private interests." *du Pont*, 366 U.S. at 326 (approving a divestiture). See *International Boxing Club* v. *United States*, 358 U.S. 242, 255-256 (1959); *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131, 171-172 (1948). The question before this Court with respect to structural relief is limited to whether the district court abused its discretion in ordering a divestiture. The judgment appropriately directs Microsoft to propose a plan for the divestiture and leaves the details of that plan to future proceedings. App. 254-257. See, *e.g.*, *Citizen Publ'g Co.* v. *United States*, 394 U.S. 131, 135 (1969).

weaken the applications barrier to entry or competes directly with Microsoft's most cherished software products." FF 93 (App. 89). The divestiture remedy limits OpsCo's ability to engage in that and other similar forms of anticompetitive conduct, while giving AppsCo increased incentives to offer applications that run on alternative operating systems and to develop cross-platform middleware.

The divestiture remedy responds directly to the district court's finding of monopoly maintenance by weakening the barrier to entry that Microsoft's predatory practices maintained and creating an independent entity, AppsCo, well positioned to renew the challenge to the operating system monopoly that Microsoft's restraints on Netscape and Java suppressed. Moreover, it does so without the need for an intrusive and cumbersome regulatory decree. The transitional conduct restrictions, which expire when divestiture is fully effective, are designed to address the specific exclusionary strategies that Microsoft pursued or similar strategies that may fairly be anticipated. Such remedies also fall well within the district court's discretion. *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 132 (1969).[23]

B. The Factual Record Presents No Obstacle To Direct Review. Microsoft argues that this Court should deny direct appeal because Microsoft intends to raise "numerous complicated factual issues" that will require the Court to "sift through an extensive record." J.S. 16-19. Microsoft's pre-

[23] Microsoft proposes to argue that the district court erred in entering the final judgment without holding a new evidentiary hearing on remedy. J.S. 23. That argument should not detain the Court. The court had discretion to decide whether additional hearings were needed, and it was entitled to conclude that the trial itself, which detailed the scope of the antitrust violations, provided an adequate basis for determining the scope of relief. The district court did not abuse its discretion in refusing to accede to Microsoft's belated requests for further delay. See App. 248-251.

diction, at the outset, is implausible. The district court trial was the "main event" for purposes of determining disputed facts. See *Anderson*, 470 U.S. at 575. The district court made cogent and comprehensive factual findings based on the evidence at trial. See App. 46-246. This Court has repeatedly emphasized that the "clearly erroneous standard," which governs review of district court factfinding, is highly deferential. *Anderson*, 470 U.S. at 571-576. That standard, by its own force, imposes inherent limits on the scope of fact-based challenges in a case such as this.[24]

Even if Microsoft is inclined to raise record-based challenges, that prospect would provide no basis for declining review. When Congress amended the Expediting Act, it was well aware that the records in government civil antitrust cases are frequently voluminous. S. Rep. No. 298, *supra*, at 8. Congress relieved the Court of the burden of routinely reviewing trial records in government civil antitrust cases, but it did so knowing that the Court would not shrink from that task in cases of general public importance. This Court has not been daunted by large antitrust records in exercising its certiorari jurisdiction.[25] It is, of course, counsel's responsibility to relate their contentions to the portions of the record that are pertinent. The Court's task here is not

[24] See, *e.g.*, 470 U.S. at 574 ("Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous."); *id.* at 575 ("[W]hen a trial judge's finding is based on his decision to credit the testimony of one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be plain error.").

[25] See, *e.g.*, *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 254 (1993) (Stevens, J., dissenting) (private antitrust action involving "2,884 exhibits, 85 deposition excerpts, and testimony from 23 live witnesses"); *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 577 (1986) (private antitrust action involving 217-page district court decision and a 40-volume joint appendix in this Court).

onerous. The Court regularly reviews cases that rest on factual records that are more challenging than this appeal would present.[26] Indeed, the Court regularly does so when exercising its original jurisdiction, where the Court must act as the ultimate *finder of fact* and review the evidence de novo. See *Colorado* v. *New Mexico*, 467 U.S. 310, 317 (1984).[27]

To the extent Microsoft elects to challenge the district court's findings, the Court should encounter no difficulty in applying the clearly erroneous standard. The district court has distilled the record into clear and well-organized findings of fact that provide a detailed roadmap of its reasoning. See App. 46-246; Add. A, *infra*.[28] The clearly erroneous stan-

[26] See, *e.g.*, *United States* v. *Fordice*, 505 U.S. 717, 725 (1992) (desegregation suit based on testimony of 71 witnesses and 56,700 pages of exhibits); *American Textile Mfrs. Inst.* v. *Donovan*, 452 U.S. 490, 501 (1981) (challenge to OSHA "Cotton Dust" standards, which were based on a highly technical 105,000-page administrative record).

[27] For example, in *United States* v. *Alaska*, 521 U.S. 1(1997), the Court decided a federal-state dispute over the location of Alaska's entire northern coast line, relying on a 565-page Special Master's report and a voluminous record that embraced a series of complex trials that began in 1980 and continued through 1986. In *Kansas* v. *Colorado*, 514 U.S. 673 (1995), the Court decided an interstate dispute over use of the Arkansas River, relying on a 459-page Special Master's report and a record, compiled over 141 trial days, that included a 19,735-page trial transcript and more than 2000 exhibits. Each of those cases involved highly technical factual and legal issues. In each instance, upon receiving the Master's report, the Court nevertheless considered the briefs, heard oral argument, and issued its opinion in the course of a single Term. Contrary to Microsoft's suggestion (J.S. 26-27), there is no reason to think that the Court cannot likewise resolve this case in a single Term.

[28] Microsoft complains that the court's findings do not cite to record evidence (J.S. 19), but courts are required to make findings of fact, not to cite evidence. See Fed. R. Civ. P. 52(a); see also *Amadeo* v. *Zant*, 486 U.S. 214, 228 (1988). The absence of record citations poses no obstacle to review because the party challenging a particular finding must identify the evidence on which it relies to show clear error. See, *e.g.*, *United States*

dard is extremely demanding, and Microsoft's examples of purported error—which are presumably its strongest examples—do not come close to satisfying the test. See *Anderson*, 470 U.S. at 573- 576.[29]

C. Postponing This Court's Review To Permit Review By The Court Of Appeals Would Not Promote The Administration Of Justice. Microsoft argues (J.S. 23-24, 29) that

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v. *United States Gypsum Co.*, 333 U.S. 364, 392-399 & nn.15-17 (1948) (reviewing, with no evident difficulty, findings of fact lacking record citations).

[29] Microsoft asserts (J.S. 18) that no "probative evidence" supports the district court's finding that "Microsoft has largely succeeded in exiling Navigator from the crucial OEM distribution channel." FF 239 (App. 159-160). The court, however, explicitly relied on a Microsoft document reporting that Navigator was being shipped through only four of the sixty OEM sub-channels. *Ibid.*; see GX 421.

Contrary to Microsoft's contention (J.S. 18), the court's further finding that "Navigator was present on the desktop of only a tiny percentage of PCs that OEMs were shipping," FF 239 (App. 160), is supported not only by the evidence from Microsoft's own document that Navigator is shipped through only four OEM sub-channels, GX 421, but also by the testimony of Franklin Fisher. Tr. 7:20-8:10, 11:15-12:10 (1/7/99 am); Tr. 42:15-21 (6/3/99 am). Microsoft ignores that evidence and cites a single document, containing an estimate that Navigator was included in "22% of OEM shipments." J.S. 18. But that estimate, which expressly states that Navigator shipments were "with minimal promotion," see GX 2440, does not reflect shipments in which Navigator is "on the desktop" rather than shipped "in a manner much less likely to lead to usage than if its icon appeared on the desktop." FF 239 (App. 159-160); see also GX 2116 (sealed).

Microsoft additionally asserts that "no probative evidence" supports the district court's finding (FF 161 (App. 122)) that "Microsoft 'bound' Internet Explorer to Windows 98" by commingling code specific to Web browsing with code that provides operating system functions. J.S. 18. Microsoft relies on testimony of its Senior Vice President James Allchin that there is no code specific to Web browsing in Windows 98 (J.S. 19), but on cross-examination Allchin admitted that Windows 98 contains code used only to browse the Web. Tr. 65:10-67:25 (2/2/99 am); see also Tr. 60:15-25 (12/14/98 am) (testimony of Edward Felten).

direct review is inappropriate because the court of appeals should be entitled to weigh in on this case. That argument disregards the purpose of the Expediting Act, which, "as its very title indicates, is to eliminate piecemeal appeals and to bring to the Supreme Court expeditiously, the entire case without intervening appeals to the Courts of Appeals." *IBM Corp.* v. *United States*, 480 F.2d 293, 296 (2d Cir. 1973), cert. denied, 416 U.S. 980 (1974). A litigant in federal court is normally entitled to only one appeal as of right. The Expediting Act reflects Congress's considered judgment that, when a government antitrust case presents an issue of "general public importance to the administration of justice," that appeal should take place in this Court.

Congress wisely preserved the Court's availability to hear cases of "general public importance" because it recognized that only this Court can ensure expeditious resolution of the appeal. If the Court accepts direct review in this case, it can surely complete the review process within the 2000 Term. See note 27, *supra*. If the Court declines, then the timing of a final resolution will be beyond any single court's control. The proceedings in the court of appeals are likely to consume at least as much time as proceedings in this Court, and the case is virtually certain to return to this Court on petition for a writ of certiorari. As a result, the final resolution of the appeal would likely be delayed by *at least* one year.

The district court, which commendably expedited the trial proceedings, certified this case for direct review in light of its awareness that a lengthy appeals process could irreparably harm competition in a vital and rapidly evolving sector of the national economy. The United States agrees. This Court alone has the authority, and therefore the responsibility, to ensure that the public interest is not harmed and that justice is not denied through delay.[30]

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[30] Microsoft argues (J.S. 27) that the presence of the State plaintiffs provides a reason to deny the direct appeal under the Expediting Act. At

CONCLUSION

The Court should note probable jurisdiction and set the case for briefing and argument.

Respectfully submitted.

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Microsoft's request, the district court consolidated the States' case with that of the United States "for all purposes" (Order (May 22, 1998)). There was a single trial, a single set of findings of fact, a single set of conclusions of law, and a single final judgment from which this appeal is taken. Although the States alleged violations of state antitrust laws, the district court applied Sherman Act standards. App. 39-40. In these circumstances, the States may be deemed "parties to the proceeding" and "[p]arties interested * * * in the judgment." Sup. Ct. R. 18.2. In any event, as a precautionary measure, the States intend to file a petition for certiorari before judgment in this case. Thus, if the Court concludes that it may lack jurisdiction over the state-related aspects of the appeal, it can either grant the petition or hold it pending resolution of the appeal and thereby avert any danger of redundant or inconsistent proceedings in the court of appeals. See *Gay* v. *Ruff*, 292 U.S. 25, 30 (1934); *Roe* v. *Wade*, 410 U.S. 113, 123 (1973); *Clinton* v. *New York*, 524 U.S. 417, 455 (1998) (Scalia, J., concurring and dissenting in part).

ADDENDUM A

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ADDENDUM B

Glossary of Frequently Used Terms

API	Application programming interface. APIs "exposed" by a computer program, such as an operating system or middleware, provide other computer programs with means of access to blocks of code that perform particular tasks, such as displaying text on the computer screen. FF 2 (App. 47).
IAP	Internet access provider. IAPs, such as America Online and MindSpring, provide computer users with access to the Internet. FF 15 (App. 50).
IE	Internet Explorer, Microsoft's Web browser. FF 17 (App. 51).
Intel-compatible PC	A PC designed to use a microprocessor in, or compatible with, Intel's 80x86/Pentium microprocessor family. FF 3 (App. 47).
Internet	A global electronic network of computers. FF 11 (App. 49).
Java	A programming language and related middleware that enable applications written in that language to run on different operating systems. FF 73 (App. 80).

JVM	Java Virtual Machine, a program that translates a Java-coded program into instructions that the operating system can understand and thus allows applications written in Java programming language to run on the operating system for which the JVM was written. FF 73 (App. 80).
Middleware	Software that relies on the APIs provided by the operating system on which it runs, but also exposes its own APIs. FF 28 (App. 57).
Navigator	Netscape Communications Corp.'s Web browser. FF 17 (App. 50-51).
OEM	Original equipment manufacturer. FF 10 (App. 49). In this brief, a manufacturer of PCs.
Operating System	A software program that controls the allocation and use of computer resources. FF 2 (App. 47).
PC	Personal computer. FF 1 (App. 47).
Platform	Software that exposes APIs. FF 2 (App. 47).
Web	The World Wide Web; a collection of digital information resources stored on servers throughout the Internet. FF 12 (App. 49).

Web Brower (or Browser)	Software that enables a user to select, retrieve, and perceive resources on the Web. FF 16 (App. 50). In this brief, the term "browser" by itself means "Web browser."
Windows	A family of software packages produced by Microsoft, each including an operating system. The principal members of this family for purposes of this case are Windows 95, Windows 98, and successors, which include operating systems for Intel-compatible PCs. FF 6-8 (App. 48-49).

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No. 00-139

In the Supreme Court of the United States

MICROSOFT CORPORATION, APPELLANT

v.

UNITED STATES OF AMERICA AND STATE OF NEW YORK, *ET AL.*, APPELLEES

On Appeal from the United States District Court for the District of Columbia

BRIEF OF SOFTWARE AND INFORMATION INDUSTRY ASSOCIATION AND COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION AS AMICI CURIAE SUPPORTING JURISDICTION

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INTEREST OF AMICI CURIAE

1. The Software and Information Industry Association is the world's largest trade association representing the interests of more than 1,000 firms in the software, information and Internet industry. Formed on January 1, 1999, through the merger of the 15-year-old Software Publishers Association (SPA) and the 30-year-old Information Industry Association, SIIA leads industry efforts in e-business, copyright, privacy, taxation and other public policy issues. SIIA's website is at www.siia.net. SIIA filed two *amicus* briefs in the district court explaining the industry's views of the liability and remedy issues.

The Computer & Communications Industry Association is an association of computer technology and telecommunications companies that range from small entrepreneurial firms to some of the largest enterprises in the industry. CCIA's members include equipment manufacturers, software developers, providers of electronic commerce, networking, telecommunications and on-line services, resellers, systems integrators, and third-party vendors. Its member companies employ nearly one million persons and generate annual revenues exceeding $300 billion. For 28 years CCIA has been the industry leader on many important policy issues, including supporting a balanced antitrust policy that ensures competition and a level playing field. CCIA participated as amicus curiae in the district court in this case, and in the proceedings examining the current Microsoft consent decree.

The amici and their members are acutely aware of market dynamics that lend special urgency to the final resolution of this case.[1] While legal constraints are stayed, Microsoft will continue to entrench and expand its monopoly, consolidating the

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[1] No counsel for a party authored this brief in any part, and no person or entity, other than the *amici curiae*, their members, or their counsel made a monetary contribution to the preparation or submission of the brief. See S. Ct. R. 37.6. The parties have consented to the filing of this brief; copies of the consent letters have been filed with the Clerk.

gains from its illegal conduct. The information technology industry cannot afford to wait any longer for a final disposition of this case. Competition suffers, and its restoration becomes more difficult, every month that Microsoft postpones its day of reckoning.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Court's decision in this case will determine whether competition or monopoly governs an industry that is vital to the Nation's economy in the 21st Century. Congress retained the direct appeal provision in the Antitrust Expediting Act, 15 U.S.C. § 29(b), for the very purpose of ensuring swift and accurate resolution of cases — such as this one — that have national significance both to the economy and to the effective enforcement of the federal antitrust laws.

The United States Department of Justice, 19 States, and the experienced district judge all recognized the exceptional economic importance of this case and the need for expeditious resolution of the status of Microsoft's monopoly. The legal issues in this case are equally significant. Their resolution will determine how and whether the federal antitrust laws protect competition in software and other high technology markets. For Microsoft to prevail, a court would have to agree that well-established competitive principles developed under the federal antitrust laws do not apply with full force to the software industry. Under Microsoft's view of the law, the manipulability of software would immunize a monopolist from liability for exclusionary suppression of competition from potential substitutes. Consumers would pay a heavy price for such a wholesale revision of antitrust principles.

This is the biggest government antitrust case in two decades and one of the most important Sherman Act cases ever litigated. Its resolution will have a profound effect on the national economy as well as on innovation in a vital sector of internet technology. As Microsoft itself has noted on other occasions, authoritative resolution of these issues is critical to millions of investors and to hundreds of thousands of people employed in

the software industry. If this case does not satisfy the requirements of the Antitrust Expediting Act, it is hard to envision a case that would. The federal government's request for expedited review — a request not made in this Court for nearly 17 years — should be granted.

1. Section 29(b) provides for the direct appeal of a government antitrust action when the district court certifies that "immediate consideration of the appeal by the Supreme Court is of general public importance in the administration of justice." At the request of the United States and the States, the district court has made that certification.

The "impact" of this case "on the economic welfare of this nation," H.R. Rep. 93-1463, at 14 (1974), is beyond serious dispute. The government proved that the world's richest corporation has used a calculated campaign of anticompetitive conduct to maintain a monopoly that directly affects the nation's economic welfare. The need for expedition is just as plain. Microsoft continues to wield its operating systems monopoly to foreclose competing technologies that might reduce the strength and durability of the monopoly. At Microsoft's request, the district court has stayed its judgment, leaving the public without any protection and permitting Microsoft to continue its campaign to monopolize adjacent markets. It may be impossible to rectify the adverse consequences of that campaign if Microsoft succeeds in interjecting additional delay into the appellate process.

2. The controlling antitrust principles laid down by this Court's prior decisions are sufficient to dispose of all of the liability and remedy issues raised by this appeal. But whether and how those principles should be adapted to software and technological markets is a matter of unusual importance to the development of federal antitrust law. Only this Court can definitively guide application of the antitrust laws in this context and promote the unimpeded development of this critical sector of the national economy.

3. The issues in this appeal fall comfortably within the institutional capabilities of this Court. Microsoft's arguments all turn on application of settled law to historical facts that have been found and elucidated in extraordinary detail by the district court. This Court has decided many antitrust cases on larger records and may dispose of make-weight arguments summarily. Although Microsoft spills much ink in attempting to demonstrate that this is a big case, it obviously was Congress's assumption that large antitrust cases of exceptional importance would be resolved under Section 29(b). In addressing the merits of this case, the Court will have the benefit of the expertise of antitrust enforcement officials at the federal and state level, experienced counsel representing Microsoft, and knowledgeable amici curiae participating on both sides of the case. Little would be gained by allowing this case to be decided initially in the court of appeals, while the costs of delay are incalculable. The appeal accordingly should be retained.

ARGUMENT

I. THIS COURT SHOULD RETAIN JURISDICTION BECAUSE THIS CASE IS IMPORTANT TO THE NATIONAL ECONOMY AND TO ANTITRUST ENFORCEMENT IN A RAPIDLY EVOLVING INDUSTRY.

No one mourns the demise of this Court's direct appellate jurisdiction over *all* government antitrust cases, no matter how modest their significance. But the impact of certain exceptional cases on the economy justifies immediate and authoritative disposition by this Court. That is why Congress, when it amended the Expediting Act in 1974, provided for direct appeal of government antitrust cases where "immediate consideration * * * by the Supreme Court is of general public importance in the administration of justice." 15 U.S.C. § 29(b). There are no more important — or more rapidly changing — markets than the computer software market. If *this* case does not satisfy Section 29(b), none does.

A. Considerations of Practical and Economic Importance Should Guide the Discretion Granted By Section 29(b).

Had Congress wanted to limit this Court's review of government antitrust cases to cases meeting traditional standards for certiorari, it would have repealed the Antitrust Expediting Act in full. Microsoft proceeds as if that were what Congress did. Asserting that this case is "not confined to one or two legal issues of the sort this Court normally considers on certiorari," and that the legal questions it presents "are important only to resolution of th[is] particular case[]" (J.S. 19), Microsoft argues that the Court should exercise its "unqualified discretion" (J.S. 15) to dismiss this appeal. Those contentions nullify Section 29(b); without it, this Court already had unqualified discretion to grant certiorari — either "before" or "after judgment" in the court of appeals (28 U.S.C. § 1254(1)).

But Congress did *not* intend Section 29(b) "to duplicate or displace" 28 U.S.C. § 1254(1). H.R. Rep. 93-1463, *supra*, at 13-14. Rather, Congress deliberately separated a narrow class of government antitrust cases from those subject only to certiorari review, because "government antitrust cases" may "have an impact on the economic welfare of this nation" unrivaled by "other federal cases." *Id.* at 14.

The considerations informing Section 29(b) review are distinct from certiorari standards in two principal respects. First, Section 29(b) jurisdiction turns "not on the general significance of the legal issues presented," but rather on "the immediate economic impact of the case itself." R. STERN, E. GRESSMAN, S. SHAPIRO & K. GELLER, SUPREME COURT PRACTICE § 2.7, at 53 (7th ed. 1993).[2] Second, Section 29(b), while

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[2] This Court's prior practice under Section 29(b) confirms that the exercise of jurisdiction under that provision does not depend on the difficulty or general importance of the legal issues presented: in the *AT&T* appeals (No. 82-952, *et al.*, & No. 83-737), the Court affirmed *summarily* in per curiam orders issued without opinions.

affording "discretion," circumscribes the discretion it obliges the Court to exercise. In deciding whether to grant certiorari, this Court independently evaluates the weight to be afforded to the private and public interest in Supreme Court review of the case at hand and to the public interest in the efficient use of the Court's resources. By contrast, Congress in Section 29(b) set forth a standard specifically addressed to the importance of the case to the economy and to antitrust enforcement.

The House Report "emphasized that the fact that the Supreme Court is accorded th[e] option" of remanding the case to the court of appeals "does not mean that the Supreme Court is intended to have a free and absolute discretion to hear or not hear a case on direct review." H.R. Rep. 93-1463, at 13. The Report drew the very contrast with certiorari that Microsoft would have this Court ignore (*id.* at 14; emphasis added)):

> Section 1254 does bestow on the Supreme Court an unqualified discretion to hear or not hear a case. *The Committee amendment does not*.

Rather, the standard set out in Section 29(b) is not mere surplusage, but has the independent significance that its inclusion in the statute suggests (*ibid.*; emphasis added):

> It is intended that the Supreme Court *hear* cases on direct review that are of general public importance in the administration of the antitrust laws.

Accordingly, the discretion that Section 29(b) confers is not "unfettered" (J.S. 16), as Microsoft maintains in reliance on inapposite authority pertaining to interlocutory appeals. Rather, the statute gives this Court discretion only to determine whether the case before it *satisfies* the stated criterion: whether the "general public importance" of the case supports "immediate consideration." Section 29(b) does not envision reopening the policy judgment of whether a case that *meets* this standard is

worthy of this Court's attention. This case plainly meets that standard, and jurisdiction should be retained.[3]

B. Rapid and Conclusive Resolution of this Case Is Exceptionally Important to the National Economy.

1. Microsoft concedes (J.S. 30) the "importance of th[is] case[]" to "the Nation's economy." The court of appeals also recognized the "exceptional importance" of the case in ordering en banc (but not expedited) consideration of this appeal before it was certified to this Court. J.S. App. A311, A312.

As Microsoft Chairman Bill Gates has stated, "there's a pretty broad recognition of the fact that information of all types will be software driven." Remarks of Bill Gates to 2000 Microsoft Financial Analyst Meeting, July 27, 2000, http://www.microsoft.com/msft/speech/analystmtg2000/gatestranscript2000.htm ("Gates Analyst Remarks"). Microsoft's dominance within the software industry is striking: its revenues exceed those of the next *six* largest firms combined, see *Fortune 1000*, FORTUNE, Apr. 17, 2000, at F-59, and dwarf those of the next *hundred* firms when only personal computer software is taken into account. See *Computers – Compatibility at Expense of Security*, Raleigh News & Observer, May 29, 2000, at D4; *The 1999 Softletter 100*, http://www.softletter.com/99sl100.pdf. The future of competition in the markets Microsoft currently dominates is of critical economic importance.

2. Speedy disposition of this appeal is necessary to limit the damage that Microsoft's anticompetitive practices continue to inflict on information technology markets. That danger is

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[3] In determining whether an appeal has sufficient "public importance" to antitrust enforcement, the Court should give "due weight" to the views of politically accountable institutions. H. Rep. 93-1463, at 14. The position of the United States and 19 States strongly corroborates its "public importance," and the "weight" accorded the views of the Department of Justice should be substantial in light of the Department's restraint in invoking Section 29(b). The Justice Department has not invoked Section 29(b) since 1983.

particularly acute given Microsoft's successful request for a stay of all of the protective provisions of the injunction in this case. Microsoft itself has recognized that software markets move at a "lightening [*sic*] pace." Microsoft Mem. Supp. Prop. Judg't 10 (D.D.C. May 10, 2000).

The fate of the formerly dynamic Internet browser market starkly illustrates the dangers of a Microsoft blitzkrieg aimed at totally unprotected adjacent industries. The exclusionary activity condemned in this case quickly vaulted Microsoft from a 5% share of the Internet browser market to a 50% share by the time of trial. J.S. App. A225-A226. Indeed, *since this case was filed*, Microsoft's share of the browser market went from less than 50% to a monopolistic *86%*. See *Microsoft Share Surges in Web Browser Market*, WALL. ST. J., June 27, 2000, at B8.

At the same time, Microsoft's operating systems monopoly has remained stable — indeed, has grown in share and power — over the past ten years. Bill Gates puts it best: Microsoft "has dominated operating systems for several generations." Pontin, *Bill Gates Unplugged*, RED HERRING, forthcoming Sept. 2000, reprinted at http://www.redherring.com/mag/issue82/mag-gates-82-home.html. Its monopoly in productivity applications also has been stable for years. In that respect, the "new economy" is not meaningfully different from the "old" one. Exclusionary conduct successfully entrenches monopolies. Microsoft again and again has relied on factually unfounded hyperbole to claim that its Windows monopoly is threatened, but neither the AOL/Netscape merger nor the emergence of Linux has made any difference on the desktop. As Bill Gates recently observed, "AOL has an announcement a day," Pontin, *supra*, but press releases do not undermine Microsoft's monopoly.

The reasons for Microsoft's success in excluding competition, and for the resultant urgency in bringing this case to a rapid conclusion, are well-known. Anticompetitive actions have greatly magnified effects in markets, like software markets, that are susceptible to "network effects." See J.S. App. A62-A63. See generally Lemley & McGowan, *Legal Implications of*

Network Economic Effects, 86 CAL. L. REV. 479 (1998). As the Windows monopoly illustrates, the popularity of a dominant software product tends to feed on itself: individuals are more likely to buy the dominant product so that they can share data with other users; employers are more likely to equip their computers with it so that they can find employees trained to operate it; and developers are more likely to write complementary software for the dominant product, making it all the more attractive for consumers. In Bill Gates' words, "the leading platform [is] significantly more popular than the number two platform because of the dynamics of software availability." Gates Analyst Remarks, *supra*. Software markets are thus prone to "tip" decisively toward a particular product once it achieves a critical market share and thereafter "lock in" users so that a monopoly may be insulated from effective competition for a substantial period. These conditions geometrically increase the harms that flow from anticompetitive conduct. And they make it imperative to rapidly adjudicate and effectively remedy antitrust violations while competition still can be restored.

3. Microsoft has made no secret that it plans to expand upon the conduct that originally necessitated this action: binding applications to the monopoly operating system to prevent complements from becoming partial substitutes for the monopoly product.[4] At this moment, Microsoft is ruthlessly extending its anticompetitive practices to other software markets. Bill Gates has declared: "We are a very predictable company. What we did with Windows on the desktop, we're doing with

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[4] In pursuing this conduct, Microsoft has shown little concern about the consequences of antitrust enforcement. It dismissed the 1995 consent decree as accomplishing no "change [in its] business practices at all," Gov't Ex. 940, at 15. Unsurprisingly, Microsoft also has announced that it does not view the present case as a reason to change its anticompetitive business practices. See, *e.g.*, Grimaldi, *Microsoft Defends Its Practices; CEO Ballmer Sees No Need to Change*, WASH. POST, Apr. 19, 2000, at E1; Uimonen, *Gates Says Court Case Won't Affect Business*, NETWORK WORLD FUSION, 2000 WL 9442689 (June 13, 2000).

Windows NT [now Windows 2000] on the server" computers that power Internet and network computing. Kirkpatrick, *He Wants All Your Business and He's Starting to Get It*, FORTUNE, May 26, 1997, at 58 (quoting Gates). Given an extra year or two of untrammeled predation resulting from a detour to the court of appeals, Microsoft is likely to lock up, or at least to "tip," additional markets to insulate its monopoly.

To avoid the perceived threat to Windows from streaming media, see Findings ¶¶ 104-114; Gov't Ex. 1368, Microsoft is now duplicating the tying arrangement it used to gain a monopoly over Internet browsers, this time tying a media player to Windows. *E.g.*, Holmes, *Microsoft May Be Testing the Limits Again*, L.A. TIMES, May 10, 2000, at A1. The company has also undertaken to redesign its Office applications to favor handheld computers that run on Windows as opposed to other operating systems such as the one used by the Palm Pilot. See Gov't Rem. Ex. 1-2. Indeed, Microsoft has identified the Internet browser, the Web server, and streaming media as "core Windows technologies" that it views as rightfully part of its permanent monopoly. See Summary Response to Proposed Remedy 22 (D.D.C. May 19, 2000).

Microsoft now is trying to intermingle the code of the monopoly product with the code of server software: 40% of the functionality of the desktop version of Windows 2000 is useless without a Windows 2000 server. See *Ballmer Is Bullish on Windows 2000*, PC WEEK, Nov. 19, 1999, http://www.zdnet.-com/pcweek/stories/news/0,4153,1018247,00.html. European competition authorities have expressed concern that this "permits only Microsoft products to be fully inter-operable." See Hargreaves, *Brussels Starts to Probe Microsoft's Windows 2000*, FIN. TIMES, Feb. 10, 2000, at 1 (quoting Commissioner Mario Monti).

Microsoft is mounting a comprehensive effort to tie its desktop monopoly products to "back-end computers," *i.e.*, servers. Buckman, *Microsoft, Advertisers Target the Wireless Web*, WALL ST. J, July 24, 2000, at B1. Most strikingly, only

two days after the district court's conduct remedies were stayed, Microsoft announced its ".NET" initiative, a sweeping new plan to yoke Internet server software to Windows. Markoff, *Microsoft Plans to Shift Product Focus to the Internet*, N.Y. TIMES, June 23, 2000, at C1. Microsoft characterizes ".NET" as an adoption of the open Internet computing standards that the acquisition of the browser monopoly was intended to derail. In reality, however, ".NET" is simply the continuation of the familiar "embrace, extend, extinguish" strategy (11/9/98 (p.m.) Tr. 53 (McGeady)) under which Microsoft pretends to embrace open Internet standards, but adds extensions to produce "polluted" Windows-specific protocols to supplant the cross-platform ones. Gov't Ex. 259, at MS7 033448 (Java). As Bill Gates has explained, "What we do is take industry standards and drive them forward," Pontin, *supra*, *i.e.*, into Microsoft-proprietary dead-ends; "we've taken very directly the [relevant] parts from Windows * * * and simply are now creating those as Internet-based services." Gates Analyst Remarks, *supra*. This new Windows "platform * * * partly runs on the client and partly runs as a service" on Internet servers. *Ibid.* The entire point of ".NET" is to "build web services that take particular advantage of * * * Windows operating systems" — that is, that use the "edge" provided by the Windows monopoly in a variety of ways to foreclose competition in the Internet server and applications markets. Schlender, *Damn the Torpedoes! Full Speed Ahead*, FORTUNE, July 10, 2000, at 98, 110.

Success in this anticompetitive undertaking would preserve the Windows monopoly from the threat of erosion from the growth of applications that locate computing logic on an Internet-enabled server rather than on a desktop. The head of Microsoft's Windows Division has made clear that "we want Windows to be the operating system you would use to deliver those services." Remarks of Brian Valentine to 2000 Microsoft Financial Analyst Meeting, July 27, 2000, http://www.-microsoft.com/msft/speech/analystmtg2000/valentinetran-script2000.htm. Users of non-Microsoft software would be "second-class citizens" for distributed Internet computing as

well as on the desktop. Markoff, *supra*, at C17. Infusing Windows operating system code in applications products also capitalizes on the stay of the structural remedies to blur "the current division between the Windows operating system and the rest of the company," David Streitfeld, *At Microsoft, A Strategic Sales Shift*, WASH. POST, June 23, 2000, at E1, in order to complicate the divestiture later.

Industry observers recognize that Microsoft's effort "to leverage its dominance in PC operating systems to establish Windows as a core internet technology," Foremski, *Microsoft Plans Fundamental Strategy Shift*, FIN. TIMES, June 22, 2000, at 22, "continu[es] the very strategy that caused the government to initially file its antitrust suit." Alexander, *Microsoft's Vision*, MPLS. STAR TRIB., June 23, 2000, at 1D. This attempt to use the current monopoly as the germ for "a sort of Windows for the Internet" has the potential to render the district court's "remedies * * * obsolete" if the appeal takes long enough. *Winternet*, THE ECONOMIST, July 1, 2000, at 62, 63. Microsoft, in short, is "applying every bit of technological leverage throughout the company to influence as much of the infotech industry as it can" before this case is finally resolved. Schlender, *supra*, at 110.

During the two to three years it would take this case to wind to a conclusion were it first remanded to the court of appeals, Microsoft could extinguish competition in these markets just as easily as it did in the browser market during the two years this case was pending in the district court.[5] Timely

[5] If this Court remanded this appeal, briefing in the court of appeals would be complete no earlier than January or February 2001, argument might be heard in April, and the case decided no earlier than the fall. Cases *reheard* en banc in the D.C. Circuit routinely consume a year or more from panel disposition to en banc decision, despite the head start afforded by the initial hearing. See Ginsburg & Falk, *The Court En Banc: 1981-1990*, 59 GEO WASH. L. REV. 1008, 1021 n. 65 (1991). (More recent cases conform to this pattern.) A petition for certiorari then would be due near the end of the year, and would be conferenced no earlier than February 2002. If certiorari were then granted, the case likely would be argued in Fall 2002 and decided in Spring 2003.

entry of a forward-looking decree can prevent anticompetitive market effects. It is much more difficult to try to restore competition after Microsoft locks in more users in more markets.

Microsoft's assertion (J.S. 2) that "[t]here are no exigent circumstances that justify" immediate review purposely ignores the speed with which Microsoft's predatory practices have swallowed competitive software markets. In the context of Microsoft's continuing activities, and its insistence on a stay of all public protection pending appeal, its effort to induce this Court to add to the delay should be seen for what it is: a transparent effort to outrun the law. This Court should not condone Microsoft's strategy of hampering law enforcement through delay.

4. The unsettling impact of this suit on the information technology industry adds to the special public importance of this appeal. Until they know for sure whether Microsoft will be split up, and whether its practices will be restrained by an antitrust decree, participants in the information technology industry cannot undertake effective planning. This uncertainty is especially devastating in an industry as dynamic as this one.

The unresolved status of this suit also has disrupted capital markets. Investors are unsure how this case will ultimately affect the structure of the information technology industry, and thus cannot reasonably apportion investments between Microsoft and other firms. Fluctuations of information technology securities in response to news events throughout this litigation produce pure deadweight losses. Providing an authoritative resolution of this case as soon as reasonably possible is of unique importance to investors, commercial creditors, and businesses that deal with Microsoft and others in this industry.

II. THIS CASE RAISES ISSUES OF LAW FUNDAMENTAL TO THE APPLICATION OF THE SHERMAN ACT TO A VITAL INDUSTRY.

Although the extraordinary economic impact of this appeal, standing by itself, justifies retaining jurisdiction, the legal questions presented are also unusually important. This Court frequently has intervened to affirm fundamental antitrust principles in monopolization cases, see, *e.g.*, *Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985) (citing numerous prior Supreme Court precedents), or to bolster application of those principles in markets that otherwise might be exposed to anticompetitive abuse. See, *e.g.*, *Eastman Kodak Co.* v. *Image Technical Services, Inc.*, 504 U.S. 451 (1992).

This case is especially important to the development of antitrust law given the inherent manipulability of software. While the physical boundaries of tangible goods are readily discerned and largely immutable, software is constructed from code that can be "grouped or constituted in an infinite number of ways." P. AREEDA & H. HOVENKAMP, ANTITRUST LAW 903 (2000 Supp.). The synthesis of software code can yield innovation, but also can be misused to stifle innovation and competition. See Amicus Brief of Lawrence Lessig 21-22, 26-27 (D.D.C. Feb. 1, 2000) ("Lessig Br."). This makes it especially important to determine reliably whether two products allegedly tied together in violation of Section 1 of the Sherman Act in fact are separate products. See *Kodak*, 504 U.S. at 462-463.

As this case illustrates, however, software is especially adaptable to product bundling as a tool for *perpetuating* monopoly power. The owner of a monopoly software product may be in a position to engage in "monopoly bundling" by merging the code of that product with other, previously distinct applications to choke off potential substitutes and to reinforce the barrier to entry resulting from network effects. See Meese, *Monopoly Bundling in Cyberspace: How Many Products Does Microsoft Sell?*, ANTITRUST BULL., Spr. 1999, at 108. That was

Microsoft's goal in bundling Explorer with Windows: not merely to monopolize a new product, but to discourage (and ultimately to prevent) software developers from gearing applications to Navigator as a middleware platform, which might have threatened Microsoft's operating systems monopoly.

Courts and commentators have approached this problem in different ways. A panel of the D.C. Circuit concluded, albeit in dictum, that the merger of applications should be immune from antitrust review so long as "there is a *plausible* claim that it brings *some* advantage" to consumers. *United States* v. *Microsoft Corp.*, 147 F.3d 935, 950 (D.C. Cir. 1998) (emphasis added).[6] That "makes the 'separate products' requirement quite useless," AREEDA & HOVENKAMP, *supra*, at 560; an operating systems manufacturer "that wishes to disadvantage makers of a particular sort of application can simply redesign its own application [and] point to benefits." Meese, *supra*, at 110. Other judges focus on whether merged "products * * * are separate from the buyer's perspective," *Microsoft*, 147 F.3d at 960 (Wald, J., concurring in part and dissenting in part), or whether "a valid, not insignificant, technological improvement has been achieved by the integration," *Caldera, Inc.* v. *Microsoft Corp.*, 72 F. Supp. 2d 1295, 1325 (D. Utah 1999).

Professor Lessig has proposed a "presumption" that "two software products combined in a 'new way' * * * [are] a 'single product,'" subject to a showing by the plaintiff that "the particular bundle at stake raises the risk of a particular anticompetitive harm." Lessig Br. 38. Professor Meese, by contrast, has suggested that merged applications be treated as "separate products" unless the *defendant* shows that "(1) the bundle does not, in fact, enhance a firm's market power and/or (2) the benefits of the bundle outweigh its costs." Meese, *supra*, at 111. Professors Lessig and Meese agree that, under either test, the

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[6] In issuing this dictum about the meaning of the 1995 consent decree after deciding the case before it on procedural grounds, the court of appeals noted that nothing would "bar a challenge under the Sherman Act" to Microsoft's bundling. 147 F.3d at 950 & n.14.

facts found by the district court in this case render Microsoft liable under the antitrust laws. See *id.* at 109-110; Lessig Br. 26-43.[7]

As Professor Lessig put it (Br. 39), in settling the question of the antitrust analysis of the bundling of software products, courts ultimately must determine whether antitrust law is "neutral" as to whether a vendor combines products "by contract or * * * by code." If instead courts offer effective antitrust immunity toward any exclusionary goal accomplished through mingling of code, antitrust law would channel software development away from modular interoperability and toward bloated products that include everything in one morass — exerting the kind of harmful judicial influence in software design that the D.C. Circuit deplored. See 147 F.3d at 952-953.

This is a legal question of enormous practical importance to an industry that is critical to the economy of the United States. It is essential that this Court finally and expeditiously resolve the uncertainty surrounding the application of the antitrust laws to the software industry. While they wait, software firms are exposed to risks of unconstrained predatory behavior, on the one hand, and of debilitating legal uncertainty, on the other.

III. THE ISSUES RAISED IN THIS APPEAL FALL WITHIN THIS COURT'S EXPERIENCE AND INSTITUTIONAL CAPACITY.

While conceding the immense "importance of th[is] case[] * * * [for] consumers and the Nation's economy" (J.S. 30), Microsoft nonetheless questions the capacity of this Court to decide it in its present posture. According to Microsoft, the size of the record and the intricacy of the issues involved make it inappropriate for the Court to pass on this appeal without the benefit of "sifting" by the court of appeals.

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[7] Microsoft's suggestion (J.S. 7) that Professor Lessig recommended a finding of non-liability is false. See Lessig Br. 9-10, 15.

This argument misconceives Section 29(b). The size of the record, the complexity of the questions presented, and the value of lower court review may be decisive considerations in the grant or denial of certiorari before judgment. But they should not defeat direct appeal of a government antitrust action where (as here) "immediate consideration" by the Court (15 U.S.C. § 29(b)) is essential to "the economic welfare of this nation" (H.R. Rep. 93-1463, at 14). Antitrust cases of exceptional "public importance" (15 U.S.C. § 29(b)) necessarily generate large records; high stakes often lead to factual as well as legal disputes. Treating the burden of deciding such cases as a proper ground for *declining* jurisdiction, then, would render Section 29(b) a dead letter.

In any event, Microsoft's complaints are wildly overstated. Nothing about this case renders immediate review impractical or inappropriate.

A. There Is Nothing Extraordinary About the Record.

The size of the trial record is surely no reason to decline jurisdiction in this important case. This Court has decided many cases with records of similar dimension.

Until the Antitrust Expediting Act was amended in 1974, this Court decided several direct antitrust appeals *every Term.* And it did so at a time when the Court was rendering 150 or more plenary decisions annually. These Expediting Act cases, and other antitrust cases, often had extensive records.[8] Indeed, the *Joint Appendices* in some of these cases exceeded 10,000 pages. See *American Tobacco Co.* v. *United States*, 328 U.S. 781 (1946); *Hartford-Empire Co.* v. *United States*, 323 U.S. 386

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[8] See, *e.g.*, *United States* v. *General Dynamics Corp.*, 415 U.S. 486, 508 (1974); *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365, 368 (70-day trial and "voluminous" record); *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100 (1969) (appendix exceeding 4000 pages); *United States* v. *Grinnell Corp.*, 384 U.S. 563 (1966) (appendix exceeding 5,000 pages); *Schine Chain Theatres* v. *United States*, 334 U.S. 110 (1948) (appendix exceeding 6,000 pages).

(1945). The capacity of the Court to dispose of multiple appeals of this size every Term refutes Microsoft's suggestion that this Court is now incapable of deciding a *single* large case of exceptional importance.

More recently, this Court has exercised discretionary review to closely scrutinize massive records for evidentiary sufficiency under complex antitrust theories. Thus, the Court examined the sprawling record of a 115-day trial in *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 243-244, 254 (1993). And the watershed decision in *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, 475 U.S. 574 (1986), rested on review of factual claims presented in a 40-volume appendix, *id.* at 577, exceeding 18,000 pages. This Court routinely decides cases with similar large records in other types of litigation. *E.g.*, *Arizona* v. *California*, 120 S. Ct. 2304 (2000) (record exceeding 20,000 pages).

Moreover, the Court will not need to review a raw trial record. Rather, experienced counsel will compile a joint appendix limited to the evidence needed to decide the appeal. This Court's long experience in cases with substantial records makes it absurd to suggest that the record in this case should deter the Court from giving effect to Section 29(b).

B. The Issues Are Readily Apparent and Clearly Framed.

Microsoft seeks to persuade this Court to delay resolution of this concededly important case by referring to the "sheer number of issues raised by [its] appeal[]." J.S. 23. In an effort to inflate these numbers, Microsoft both restates the same issues several different ways and proffers frivolous theories, such as the assertion that this litigation threatens its civil rights. The Court should view this desperate gambit for what it is — an effort to string out the present litigation by any expedient.

In virtually every case certified under the Expediting Act, the antitrust defendant could recite a host of marginal issues as a device to deter direct appeal. In the meanwhile, of course, the

defendant, having secured a stay pending appeal, could continue to engage in anticompetitive practices worth billions of dollars annually. This kind of artful pleading and dodging would go far toward making the Expediting Act a nullity.

In any event, in either this Court or the court of appeals, this appeal will involve the same record, the same potential issues, and the same applicable standards of review. In either venue, Microsoft will have to winnow the universe of potential issues to focus attention on the strongest ones — or expect summary rejection of its claims. The page limits applicable to briefs in both courts will aid that salutary requirement. Perhaps Microsoft hopes to use a scattershot approach in the court of appeals and let that court's reaction determine the arguments to be recycled in this Court. Whatever private benefit Microsoft might derive from this strategy, however, pales before the *public's* interest in a rapid and authoritative disposition of this case — an interest codified in Section 29(b).

Microsoft's artful proliferation of issues amounts to far less than meets the eye. The Court will address a set of extensive findings based on essentially undisputed historical facts, often resting on internal Microsoft documents. Under the "almost insurmountable burden" imposed by clear-error review, *International Boxing Club* v. *United States*, 358 U.S. 242, 252 (1959), Microsoft is unlikely to displace the Findings of Fact.[9]

Ultimately, there is a small set of important issues in this case, none of which is likely to change significantly in character were this case remanded to the court of appeals, and none of

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[9] Microsoft claims (J.S. 16) that this Court's review will be impeded by the lack of record citations in the Findings of Fact. Those findings are entitled to deference nonetheless, see *Amadeo* v. *Zant*, 486 U.S. 214, 228 (1988), and experienced appellate counsel can be counted on to bring relevant parts of the record to the Court's attention. Indeed, this Court has summarily affirmed decisions based on findings of fact that lacked record citations. *E.g.*, *Jerrold Electronics Corp.* v. *United States*, 365 U.S. 567 (1961), aff'g 187 F. Supp. 545 (E.D. Pa. 1960).

which is likely to involve intricate factual disputes when viewed through the lens of clear-error review. Microsoft claims that it will dispute the district court's market definitions, but concedes (J.S. 19-20) that this dispute turns on a "mixed question of fact and law" that depends primarily on the appropriate legal analysis. Whether Microsoft's conduct violated antitrust norms is more a question of what rules apply than of application of the correct rule to the historical facts. And whether the injunction entered by the district court complies with remedial principles set down by this Court in a long line of relevant precedents is again a matter of antitrust law and judicial policy.[10]

In short, there is little to be gained from interposing delay of a year or more to seek preliminary opinions from the court of appeals. This Court will receive the benefit of several reasoned perspectives on the issues. The Court not only will be assisted by briefing from able counsel for Microsoft and the plaintiffs, but also will receive amicus submissions from all sectors of the information technology industry and from antitrust experts. If Bill Gates is correct in asserting that the court of appeals already has "spoken directly to this case," Pontin, *supra*, then there is nothing at all to be gained from remanding this appeal. But whatever the marginal value of ventilating this case in another lower court, it cannot outweigh the enormous public interest in rapid and authoritative disposition of the case by this Court.

CONCLUSION

This Court should retain jurisdiction of this appeal.

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[10] See, *e.g.*, *Otter Tail Power Co.* v. *United States*, 410 U.S. 366, 381 (1973); *Ford Motor Co.* v. *United States*, 405 U.S. 562, 573, 577-578 (1972); *United States* v. *United Shoe Machinery Corp.*, 391 U.S. 244, 250 (1968); *United States* v. *E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 323, 326 (1961); *Schine Chain Theatres, Inc.* v. *United States*, 334 U.S. 110, 128 (1948).

Respectfully submitted.

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IN THE

Supreme Court of the United States

MICROSOFT CORPORATION,

Appellant,

—v.—

UNITED STATES OF AMERICA and STATE OF NEW YORK, *ET AL.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF OF AMICUS CURIAE PROJECT TO PROMOTE COMPETITION AND INNOVATION IN THE DIGITAL AGE ("PROCOMP") IN SUPPORT OF APPELLEES

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INTEREST OF THE AMICUS CURIAE

This brief is being submitted on behalf of the Project to Promote Competition & Innovation in the Digital Age ("ProComp"), an organization founded in 1998 by companies such as Sun Microsystems, Oracle, Netscape, and The Sabre Group for the purpose of analyzing competition and other policy issues relating to information technology.[1] ProComp's membership consists of a number of companies and trade associations with particular knowledge and expertise in markets relevant to the issues raised in *United States v. Microsoft*, Nos. 98-1232, 98-1233 (D.D.C.), and to the future of the information technology sector of the economy.

Given the particular knowledge of ProComp's members, ProComp is able to provide a unique perspective on two important issues before the Court: (1) the significance and public importance of this matter to the American economy; and (2) the critical importance of the swift resolution of this matter to the information technology sector.[2]

Members of amicus curiae ProComp participate in and are uniquely knowledgeable of information technology industries that are central to the health of the current economy. These companies understand the potential for continued harm to the information technology sector and the American economy as a whole absent the swift resolution of this matter.

SUMMARY OF ARGUMENT

The Court should retain jurisdiction of Microsoft Corporation's appeal from the judgment of the United States District Court for the District of Columbia.

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[1] No counsel for a party authored this brief in any part, and no person or entity, other than the amicus curiae, their members, or their counsel made a monetary contribution to the preparation or submission of the brief. *See* SUP. CT. R. 37.6.

[2] All parties consented to the filing of this brief.

Congress amended the Expediting Act in 1974 to eliminate most direct antitrust appeals to this Court, but in Section 29(b) explicitly retained the presumption of direct appeal for cases such as this, cases so economically significant as to be of such "general public importance in the administration of justice" that swift and final resolution is highly desirable. 15 U.S.C. § 29. This case meets the statutory criteria precisely.

It is difficult, if not impossible, to imagine an antitrust case that *would* be appropriate for direct review under Section 29(b) if this case is not. To accept Microsoft's arguments is to determine, for all practical purposes, that Section 29(b) no longer exists.

The speed and finality with which this case is resolved will determine whether the antitrust laws will promote competition in high technology industries crucial to the economy as these laws have in previous eras of technological innovation and change.

Swift resolution is critical in light of the speed with which Microsoft can and has illegally walled off its operating systems monopoly from competitive challenge. Here, the burden imposed by the amended Expediting Act is light because the only important issues are legal rather than factual.

The government and the courts have invoked the Act only for the most momentous antitrust cases -- the AT&T cases, *California v. United States*, 464 U.S. 1013 (1983) and *Maryland v. United States*, 460 U.S. 1001 (1983), which determined the competitive landscape for the telephones on every business desk and in every home, and now this case, which will determine the competitive landscape for the most essential operations of the computers that sit on almost all business desktops and in an increasing majority of homes.

The need for immediate review is particularly striking here. The remedies having been stayed, Microsoft now

operates free from any constraints on its conduct, and predictably is continuing its efforts to extend its operating systems monopoly to engulf and destroy still more potential threats. Microsoft's strategy is to delay final judgment until it successfully eradicates another wave of potential competitors through the same tactics that correctly were condemned in the district court. Even after the trial, new predation is being undertaken. *See infra* pp. 10-12.

Were this Court to decline this appeal, Microsoft very well might prevail for all practical purposes no matter what result this Court eventually reached on certiorari two or three years hence. That is a risk that American consumers should not be forced to bear.

The controlling issues in this case, while of great public moment, are few and straightforward. The most important conclusion of the district court is that Microsoft employed a campaign of predatory conduct in order to monopolize and attempt to monopolize both personal computer operating systems and web browsers in violation of Section 2 of the Sherman Act. The reason price predation is rarely attempted and even more rarely successful, as noted by the Court in *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 589 (1986), and *Brooke Group* v. *Brown & Williamson*, 509 U.S. 209, 226 (1993), is that the predator must typically lower price by increasing its rate of output and thereby incurs ever higher marginal costs. The predator thus suffers far greater losses than its intended victim.

In this case, however, marginal costs associated with distributing the browser are extremely small compared with the fixed costs of research and development for product development and improvement. The marginal cost curve, instead of rising with output, is virtually flat. This means that, marginal costs being de minimis, the predator and its victim spend equivalent amounts on fixed costs, and the company with the greatest financial reserves wins, driving the other out of the market. That is precisely what happened

when Microsoft gave its browser away, forcing Netscape to match its zero price. Since Microsoft had overwhelming financial superiority, it eliminated the Netscape browser's potential to compete directly with Microsoft's operating system.

The principle of predation here is the same as that in sham litigation cases in which the costs are equal for the predator and the victim. This Court's decisions in *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972), and *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973), illustrate this principle of monopolization by sham litigation.[3] The economic rationale of predation there is the same as the rationale in Microsoft's case. There was, moreover, no efficiency gain from the behavior in the sham litigation cases, nor was there, the district court found, any such gain in Microsoft's giving away of its browser or in bolting the operating system and the browser together so that computer manufacturers had to take both.

Microsoft wanted to drive Netscape from the browser market, as the evidence makes clear, because the browser was capable not only of searching the Internet for information, but was also capable of becoming a platform to which applications could be written. That development would have meant, as Microsoft's internal memoranda show, that consumers and application writers would have been indifferent to what operating system underlay this new platform, thus rapidly eroding Microsoft's operating system monopoly.

Microsoft buttressed its bolting tactic by demanding exclusive dealing contracts with Internet access and content providers. Exclusive dealing is a poor tactic for gaining a

[3] These cases are not discussed for the purpose of defining the legal standard for sham litigation, most recently set forth in *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49 (1993), but to illustrate the economic setting in which predation can occur and be successful.

monopoly but an excellent weapon for a company already holding a monopoly position. The customer has nowhere else to turn and so must deal exclusively or primarily with the monopolist.

The same desire to preserve its monopoly led Microsoft to impede Sun Microsystem's Java technology, software capable of working on all operating systems and thereby making the particular operating system a matter of indifference to consumers and application writers. Through a series of actions whose sole effect and purpose were to prevent the Java technology from enabling new operating system competitors, Microsoft impeded Sun Microsystem's Java efforts and thereby maintained the high barriers to entry. (District Court Findings of Fact, dated November 5, 1999 ("Findings of Fact") ¶ 407.)

Microsoft's assault on Netscape's Navigator and Sun's Java technology are illustrative of Microsoft's overall agenda of eliminating what the district court referred to as the "middleware threats."[4] (Findings of Fact ¶ 68.) Microsoft has followed similar strategies against Intel's Native Signaling Processing software, Apple's QuickTime technology, RealNetwork's multimedia playback technologies, and IBM's Notes and other software products. (Findings of Fact ¶ 78.) "Microsoft's interactions with Netscape, IBM, Intel, Apple, and RealNetworks all reveal Microsoft's business strategy of directing its monopoly power toward inducing other companies to abandon projects that threaten Microsoft and toward punishing those companies that resist." (Findings of Fact ¶ 132.) "Microsoft feared all of these technologies because they facilitated the development of user-oriented software that would be

[4] Middleware technologies, such as Navigator and Java technology, operate on top of the underlying operating system and have the potential to support full-featured applications without regard to the technical characteristics of the underlying operating system. (Findings of Fact ¶¶ 68-69.)

indifferent to the identity of the underlying operating system." (Findings of Fact ¶ 78.)

These are not issues that require appellate review at a level below this Court. They are clear in economic terms and can be resolved by the application of well-known antitrust principles and precedent. There is every reason, therefore, for this Court to retain jurisdiction over the appeal Microsoft has filed.

ARGUMENT

I. CONGRESS PRESERVED APPELLATE JURISDICTION UNDER SECTION 29(b) PRECISELY FOR CASES LIKE THIS ONE

When the standards of Section 29(b) are met, as they are here, the presumption is that this Court will hear the appeal. Microsoft assumes that the standards for certiorari, and only those standards, apply here. (Microsoft Jurisdictional Statement, filed July 26, 2000 ("Microsoft J.S.") at 15-23.) Microsoft also asserts the Court's discretion here is "unfettered." (Microsoft J.S. at 16.) Both contentions are wrong.

In deciding whether to retain jurisdiction on an appeal under Section 29(b), the single determination this Court must make is whether the appeal is of "general public importance in the administration of justice." Neither the volume and complexity of the issues on appeal nor the standard for certiorari has any role in such a determination. It is the importance and exigency of the case that should work to keep a case in this Court. *See* H.R. REP. NO. 93-1463, at 13-14 (1974); *see also* R. STERN, ET AL., SUPREME COURT PRACTICE 53 (7th ed. 1993).

A. By Contrast With Certiorari Standards, Section 29(b) Presumes Appellate Jurisdiction

Under 28 U.S.C. § 1254, governing petitions for certiorari, this Court must affirmatively grant review. Under Section 29(b), by contrast, the Court must affirmatively deny

review. Thus, the presumption is that certiorari petitions will ordinarily be denied even if worthy of review by this Court, while the presumption is that review on direct appeal of a government antitrust case that meets Section 29(b) standards will ordinarily be granted.

That shifting of burdens was not coincidental. As the House Report explained, Congress preserved part of the Expediting Act precisely because, for these cases, it did not want the Court to have "free and absolute discretion to hear or not hear a case on direct review." H.R. REP. NO. 93-1463, at 13 (1974). Indeed, the Report took pains to distinguish the certiorari standard from that governing proceedings certified under Section 29(b). *See id.* at 13-14. If the case appealed in fact is "of general public importance in the administration of the antitrust laws," the express "inten[t]" of Congress is that this "Court hear [the] case[] on direct review." *Id.* at 14.

Microsoft recognizes that this case is exceptionally important to the economy. (*See* Microsoft J.S. at 30.) It cannot now contend to the contrary without contradicting its prior representations and also asserting the insignificance of the world's most valuable company, the software industry, and a monopolist's exclusionary conduct.

B. The Economic Importance Of This Case Is Obvious

Microsoft has stated of its monopoly product: "Windows is very important to the Nation's economy." (Microsoft's Summ. Resp. to Pl.'s Proposed Final J. ("Summ. Resp.") at 4 (D.D.C. May 10, 2000).) Indeed, in asserting the case's "significant . . . impact on the Nation's economy," Microsoft recognized that computing is the cornerstone of the global economy, and personal computers remain at the core of computing. More than one hundred million personal computers are sold each year, almost all of which run

Microsoft Windows.[5] (Microsoft J.S. App. at A60-A61.) Microsoft claims that "tens of thousands" of other market participants "have built their entire businesses on Windows." (Summ. Resp. at 4.) The "millions of consumers who use Microsoft's products," (*id.*), daily pay the price (in lost productivity) of Microsoft's suppression of innovation.

Since the initiation of the Department of Justice's lawsuit against Microsoft, Microsoft representatives have repeatedly stressed the significance of the high-tech industry to consumers and the American economy. For example, on Microsoft's website and in a television advertisement, Bill Gates stated that since its origin, the personal computer has "become a tool that has transformed our economy and had a profound effect on how we live and how our children learn."[6] Also according to Mr. Gates, the personal computer industry "has grown to generate one-quarter of America's real economic growth and 8% of its national output." Bill Gates, *Compete, Don't Delete*, THE ECONOMIST, June 13, 1998, at 19. Mr. Gates has also characterized the software marketplace as "an engine of economic growth in America."[7]

The issues in this case impact the overall software and Internet industries. As the district court found, software vendors are reliant upon Microsoft. (Findings of Fact ¶¶ 36-44.) They make strategic business decisions based on the operating system market and rely upon technical information

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[5] *The Best Is Yet to Come*, remarks by Bill Gates to WINHEC 2000, New Orleans, Apr. 25, 2000, <http://www.microsoft.com/billgates/speeches/04-25winhec00.htm>; *Gartner's Dataquest Says Worldwide PC Industry Experienced 15 Percent Growth in First Quarter 2000*, press release, Apr. 24, 2000, <http://gartner12.gartnerweb.com/dq/static/about/press/pr-b200019.html>.

[6] *New TV Ad Communicates Microsoft's Commitment to Innovation*, Microsoft PressPass website, April 6, 2000, <http://www.microsoft.com/PressPass/features/2000/04-06tv.asp>.

[7] *Microsoft Press Conference Responding to Final Judgment in Government's Antitrust Case*, Microsoft PressPass website, June 7, 2000, <http://www.microsoft.com/PressPass/trial/jun00/06-07pressconf,asp>.

from Microsoft. *Id.* Software vendors are entitled to know whether Microsoft will continue to dominate the operating system or whether they will have the opportunity to work with other operating system companies.

Moreover, this case may decide the future of Internet computing. Monopolizing the browser not only protected the operating system monopoly but also gave Microsoft control over the browser software that serves as the universal interface between users and the Internet. If Microsoft can control all access to the Internet, that might be the most important and damaging monopoly in history. The outcome of this case may substantially affect the nation's economic well being.

C. Timely Resolution Of This Case Is Critical To Minimize Competitive Harm And Provide Certainty In Significant Markets

The need for immediate resolution is beyond serious dispute. Microsoft itself insists that software markets move at a "lightening [*sic*] pace." (Microsoft Mem. Supporting Proposed J. at 10 (May 10, 2000).) Because the district court stayed the entire remedy in this case, Microsoft remains free to insulate and expand its monopoly position by choking off competitive threats with the very tactics held illegal here. Swift and final resolution is therefore vital.

First, consumers and other industry participants are entitled to immediate relief from the ill effects of the illegal maintenance of Microsoft's monopoly position. Microsoft's durable monopoly over personal computer operating systems remains intact, and its share of that market continues to grow.[8] (*See* Microsoft J.S. App. at A60.) The progress of

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[8] Microsoft's market share for personal computer operating systems remains overwhelming. (Findings of Fact ¶ 35.) The Linux operating system remains almost non-existent on desktop personal computers and is unlikely to induce a sufficient number of software vendors to develop applications running on Linux. (Findings of Fact ¶

the market in the two years since this case was filed demonstrates that Microsoft can choke off competitive threats to its operating systems monopoly and destroy competition in adjacent markets in a very short time. When this action was filed in May 1998, Microsoft's market share of Internet browsers was about forty percent. The evidence at trial, from later that year, showed a share barely exceeding fifty percent. The most recent estimates based on actual browser usage reflect an eighty-six percent share. *See Microsoft Share Surges in Web Browser Market*, WALL. ST. J., June 27, 2000, at B8. That rapid monopolization occurred primarily because new computers with a browser bolted onto the operating system replaced older computers.

Remanding this case would delay its final resolution for at least one year, and more likely for two or three years. The en banc court of appeals is unlikely to decide the case in less than a full year from the ordering of a briefing schedule. In all likelihood, the proceedings on petition for certiorari would carry over into early 2002, so that this Court would not be able to review the decision of the court of appeals until October Term 2002, and would decide it in mid-2003.

The additional years of delay would have several deleterious effects. First, there is a substantial cost to consumers deprived of the benefits of competitive markets. Second, potential competitors and investors need to know whether the antitrust laws will constrain Microsoft from abusing its operating systems monopoly to destroy competitive threats. Postponing final review would prolong their uncertainty and prevent them from making informed economic decisions.

50.) Similarly, other potential competitors do not pose a viable restraint on Microsoft's exercise of monopoly power. (Findings of Fact ¶¶ 47-49 & 53-56.) Consequently, Microsoft's monopoly power continues to harm consumers through reduced innovation and to harm other market participants by restraining competition. (Findings of Fact ¶¶ 408-412.)

Third, while all remedies are stayed, Microsoft may continue to exploit its monopoly and use similar tactics to destroy additional competitive challenges and to extend its monopoly into adjacent markets. In particular, Microsoft has incentives to extend its power into operating systems for handheld devices and servers. Similar to browsers, software that reside on these alternative platforms may evolve into threats to Microsoft's monopoly in operating systems for desktop personal computers. (Decl. of Rebecca M. Henderson in Supp. of Proposed Gov't Remedy, Apr. 28, 2000, ¶ 37; Decl. of Paul M. Romer in Supp. of Proposed Gov't Remedy, Apr. 27, 2000, ¶ 31.) Microsoft has already taken steps to increase its market power over operating systems for handheld devices as well as those for servers. On July 11, 1999, Bill Gates instructed his staff to demonstrate how Microsoft's handheld software connects to other Microsoft software better than competition's handheld software. (District Court Gov't Ex. Remedy 1.) Mr. Gates proposed that Microsoft reconfigure certain functions in Microsoft Outlook so that they run only with Microsoft's software for handheld devices. *Id.* Similarly, with respect to operating systems for servers, Microsoft is already using security protocols that discourage the use of non-Microsoft servers in enterprises that have installed Windows 2000 on desktops. (Decl. of R. Henderson ¶ 49; Decl. of Edward W. Felten in Supp. of Proposed Gov't Remedy, Apr. 28, 2000, ¶¶ 78-79; and, Decl. of P. Romer ¶ 35.)

Further, Microsoft is binding a streaming media player with Windows. Andrews, *Microsoft Picks Next Battle With Media Player 7*, SEATTLE TIMES, July 17, 2000. Microsoft considered a rival streaming media vendor to be "an OS [*i.e.*, operating systems] contender" by virtue of its middleware characteristics. (District Court Gov't Ex. 1368; *see also* Microsoft J.S. App. at A94-A99.) Microsoft's latest initiative uses monopoly control over the browser and the operating system to make all software dependent on a

proprietary "Microsoft.NET" platform embracing server computers as well as client desktop computers and handheld devices. *See generally* Microsoft Corp., White Paper, *Microsoft.NET: Realizing the Next Generation Internet* (June 2000) .

II. THIS COURT CAN EFFICIENTLY AND PROMPTLY RESOLVE THIS APPEAL

The Court should retain this appeal for the additional reason that the genuine issues are few and clear as well as matters of fundamental antitrust policy. This Court is perfectly well-equipped to decide those issues.

The controlling issues consist of basic law and economics. Microsoft's position throughout has been that the nature of the software industry requires alteration or abandonment of those principles and the prior Supreme Court decisions that embody them. This Court can and should answer that contention rapidly and decisively. Review by the court of appeals could add very little to this Court's analysis.

Microsoft's tactics followed a consistent, well-established principle of monopolization, that of using a range of exclusionary conduct to foreclose competitive threats. This case is unusual only because there is so much direct evidence, much of it in explicit Microsoft internal communications, that clarifies Microsoft's intentions and conduct. These documents were not the customary braggadocio and bluster commonly found in the files of fierce competitors. Rather, the company's top executives, including Chairman Bill Gates, laid out explicit plans to destroy Netscape's browser and then executed those plans to perfection. These were not the expressions of animal spirits but a roadmap to successful predation.

There is no ambiguity about the anticompetitive nature of Microsoft's conduct, or about the complete absence of any valid efficiency justifications for Microsoft's wide-ranging

exclusionary activity. *See Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.*, 472 U.S. 585, 608 (1984) *aff'd*, 472 U.S. 585 (1985).

At the core of almost every significant episode of monopolistic conduct in the record is Microsoft's manipulation of the indisputable need of industry participants for access to the Windows operating system. That is what this Court condemned in *Lorain Journal* v. *United States*, 342 U.S. 143 (1951). Like Microsoft, the monopolist in *Lorain Journal* refused to supply an "indispensable medium" except in a way that foreclosed nascent competition from a small company with a competing technology. Like Microsoft, the monopolist in *Lorain Journal* failed to prove an efficiency justification for its conduct, and this Court therefore condemned that conduct as the district court condemned Microsoft's activity.

The conduct condemned in this case went beyond the use of predatory contract terms. Microsoft's most dramatic tactic, the incorporation of the Internet Explorer browser into the monopoly Windows operating system, served the same purpose. That tactic differed from the predatory conduct alleged in *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, 475 U.S. 574 (1986), and *Brooke Group* v. *Brown & Williamson*, 509 U.S. 209 (1993). Unlike those cases, in which gaining a monopoly and recouping the costs was highly speculative, here the expected reward from the predation came from the maintenance of an existing, highly profitable monopoly. The fact of minimal marginal costs and the enormous disparity in financial resources made predation even more feasible here as it was not in the prior cases.

The primary significance of the bolting together of Windows and Internet Explorer is found not in tying doctrine under Section 1 of the Sherman Act, but rather under principles of monopolization under Section 2. Because the district court found, with ample record support, that this

bundling was neither undertaken for nor justified by efficiency concerns or other "valid business reasons," *Eastman Kodak Co.* v. *Image Technical Services, Inc.*, 504 U.S. 451, 483 (1992), the conduct was properly condemned. *See Aspen*, 472 U.S. at 608.

Microsoft intends to argue that its conduct could not violate Section 2 of the Sherman Act unless each particular instance or variety of exclusionary conduct, viewed alone, constituted a Section 2 violation — and may argue even that conduct must constitute an independent Section 1 violation in order to violate Section 2. (Microsoft J.S. at 22.) But a series of actions, each small in itself, may keep a monopoly safe from competition by forestalling avenues of competitive challenge one by one. This Court in *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962), made unmistakably clear that a monopolist cannot evade liability for a coordinated campaign of illegal monopolization on the ground that each act in isolation might not constitute a Section 2 violation. As the Court confirmed in *Aspen*, monopolization analysis frequently requires an examination of the validity of the "efficiency justification" for an entire "*pattern* of conduct" that forecloses competition, 472 U.S. at 608, not an artificial parsing of each act as if its anticompetitive effects bore no relation to its context.[9] To impose on some conduct the additional requirement that it first violate Section 1 in order to violate Section 2 would disregard the accepted principle that the conduct of a monopolist is viewed through a "special lens" differing from that used for parties without monopoly power. *Kodak*, 504 U.S. at 488 (Scalia, J., dissenting) (citing 3 P. AREEDA & D. TURNER, ANTITRUST LAW § 813, at 300-302 (1978)).

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[9] Indeed, the defendant in *Aspen* had contended that its pattern of conduct could not be condemned under § 2 unless each element was independently illegal. *See Aspen Highlands Skiing Corp.* v. *Aspen Skiing Co.*, 738 F.2d 1509, 1522 (10th Cir. 1984), *aff'd*, 472 U.S. 585 (1985).

Microsoft contends that two judges on the D.C. Circuit worked a sea-change in antitrust law and analysis. (Microsoft J.S. at 4-5.) The issue before the court in *United States* v. *Microsoft*, 147 F.3d 935 (D.C. Cir. 1998), however, was entirely procedural: whether in a consent decree proceeding a preliminary injunction could be issued without notice or hearing. The full panel held that it could not. *Id.* at 938. The majority went on, however, to suggest that in the consent decree case, it was enough if Microsoft ascribed "facially plausible benefits to its integrated design." *Id.* at 950. This discourse was entirely dicta. The district court had not held hearings on the combining of the operating system and browser, there were no findings of fact, no record, and no briefing of the question in the court of appeals. The panel majority warned that its discussion was not final even in the consent decree litigation, *id.* at 952, much less in the coming Sherman Act trial. *Id.* at 950 & n.14. The majority emphasized that "[t]he guidance this opinion seeks to provide is limited to setting out the legal framework for analysis. The ultimate sorting out of any factual disputes is a different question, and one we of course cannot resolve on the limited record before us." *Id.* at 951, n.15.

The majority observed that "[m]anufacturers can stick products together in ways that purchasers cannot without the link serving any purpose but an anticompetitive one. The concept of integration should exclude a case where the manufacturer has done nothing more than to metaphorically 'bolt' two products together." *Id.* at 949.

While a degree of judicial modesty in the face of technological complexity is appropriate, this Court has often engaged in the necessary analysis when issues such as those common in patent and antitrust litigation call for it. *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2 (1984), decided the separability of anesthesiology from other hospital services and the comparative benefits of offering the

two together or separately. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.* 472 U.S. 585 (1985), decided that there was no efficiency justification for defendant ending the practice of offering passes good on both companies' mountains, and thus, the behavior was predatory.

The D.C. Circuit panel majority's dicta are not controlling or even persuasive on the record now made in this case, nor did the panel majority say that its dicta should be controlling. Microsoft can gain no comfort from that very different case, and the dicta are no reason for this Court not to retain jurisdiction now.

Microsoft complains that this case moved too quickly, (Microsoft J.S. at 4-6), although more than two years passed between the filing of the Complaint and the Final Judgment. Swift resolution of antitrust claims is essential if the antitrust laws are to provide an effective curb on anticompetitive activity in software markets where a span of four or five years for trial and appeals is an eternity. If significant antitrust cases cannot be brought, and relief cannot be obtained, far more quickly, the substantive law of antitrust becomes largely irrelevant because it is practically unenforceable. After several years, competitors' opportunities dissipate, consumers are locked in, and wrongdoers are strengthened by ill-gotten gains. The district court provided a fair trial, and that is all that matters.

Immediate review is also appropriate because the controlling issues are well-framed and made perfectly clear by the district court's 412-paragraph Findings of Fact and the conclusions of law[10] which follow inexorably from those findings. There will be no difficulty in identifying and deciding the issues actually presented on appeal.

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[10] Section 29(b)'s restriction to cases in which equitable relief was sought reflects a recognition that expedited consideration is particularly appropriate where the Court need not guess at what a jury found significant in reaching a general verdict.

Certainly the fact that the district court's Findings of Fact did not cite the record presents no special difficulty. Microsoft will marshal evidence that, it contends, renders a finding clearly erroneous. The plaintiffs will marshal the evidence supporting the finding. Each party will cite the evidence and findings in the Joint Appendix. The Court's task will be neither complicated nor difficult.

The Court should not be distracted by the array of challenges that Microsoft suggests it will raise on appeal. That list of potential issues, (Microsoft J.S. at 21-23), bears little resemblance to the issues that actually will be dispositive. The factual challenges that Microsoft enumerates are largely frivolous in light of the supporting material in the record (often in admissions by Microsoft documents). Such challenges are likely to be susceptible of rapid resolution because the clear error standard prevents this Court from "revers[ing] the finding of the trier of fact simply because it is convinced that it would have decided the case differently." *Anderson* v. *City of Bessemer City*, 470 U.S. 564, 573 (1985). The findings need only be "plausible in light of the record viewed in its entirety," *id.* at 574, a conclusion that severely understates the strength of the Findings of Fact in this case. In any event, very few of the factual challenges bear on the question of liability.

Similarly, because a court, not a jury, found the facts in this case, disputes over the admissibility of evidence lack significance. As this Court has observed, "[i]n bench trials, judges routinely hear inadmissible evidence that they are presumed to ignore when making decisions." *Harris* v. *Rivera*, 454 U.S. 339, 346 (1981). A reviewing court simply decides the appeal "as if [the inadmissible evidence] was not in the record." *Sinclair* v. *United States*, 279 U.S. 749, 767 (1929) (quoting *United States* v. *King*, 48 U.S. (7 How.) 833, 855 (1849)).

Microsoft belabors the raw size of the trial record in an apparent effort to convince the Court that this case is too

much trouble, no matter what the relevant jurisdictional statute says. *Any* case that is of exceptional importance to the national economy and to the administration of the antitrust laws — any case that meets the standards of Section 29(b) — will usually involve a large record and the resisting party will be able to spin out many *potentially* appealable issues.

This Court repeatedly has demonstrated an ability to resolve important issues on records at least as complex as the record in this case. Before the Expediting Act was curtailed in 1974, this Court heard between two and four direct appeals of government antitrust cases every Term. Many of the most important antitrust doctrines were explicated in such cases, and many of those cases involved records of exceptional size and great complexity.[11] As Microsoft points out, many Justices objected to the burden of hearing direct appeals of every routine government antitrust case. But Congress responded to those concerns, *not* by eliminating direct appeal jurisdiction in government antitrust cases, but by limiting that jurisdiction to the most important cases. The burden of adding a direct appeal of an extraordinarily significant case to this Court's current docket every decade or so bears no resemblance to what the Court faced before the 1974 amendment.

Indeed, since 1974, this Court has repeatedly demonstrated its ability to resolve important cases presenting a multitude of issues on bulky records. These include massive administrative cases such as *FDA* v. *Brown & Williamson Corp.*, _ U.S. _, 120 S. Ct. 1291 (2000), and

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[11] *E.g.*, *United States* v. *Connecticut Nat'l Bank*, 418 U.S. 656, 658 (1974) ("lengthy trial [resulting in] extensive findings and conclusions"); *United States* v. *Marine Bancorp., Inc.*, 418 U.S. 602, 616 & n.13 (1974) ("extensive record"); *United States* v. *General Dynamics Corp.*, 415 U.S. 486, 508 (1974) ("thousands of pages of transcript and hundreds of exhibits").

original matters such as *Arizona* v. *California*, _ U.S. _, 120 S. Ct. 2304 (2000). The records of two of the most important private antitrust cases taken on certiorari put this case in proper context. The *Matsushita* case involved a forty-volume appendix. 475 U.S. at 577. That appendix was based on a district court record that comprised, among other things, a "17,000 page final pretrial statement" and "250,000 documents, the originals of many of which [we]re in Japanese." *Zenith Radio Corp.* v. *Matsushita Elec. Indus. Co., Ltd.*, 505 F. Supp. 1125, 1137 (E.D. Pa. 1980), *aff'd in part & rev'd in part*, 723 F.2d 238 (3d Cir. 1983), *rev'd*, 475 U.S. 574 (1986). More recently, in deciding *Brooke Group*, this Court confronted the "voluminous" record of a "115-day trial," 509 U.S. at 243-44, including "2,884 exhibits, 85 deposition excerpts, and testimony from 23 live witnesses." *Id.* at 254. But in that private case this Court nonetheless undertook the task of "review[ing] the sufficiency of the evidence" itself in order to "avoid[] the systemic costs associated with further proceedings" in the lower court. *Id.* at 230.

These were private cases and, given the mandate of section 29(b), this case much more clearly warrants immediate review by this Court.

CONCLUSION

The appeal should be accepted and set down for full briefing and argument.

Respectfully submitted,

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IN THE

Supreme Court of the United States

MICROSOFT CORPORATION,

Appellant,

—v.—

UNITED STATES OF AMERICA and STATE OF NEW YORK, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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List of Parties and Rule 29.6 Statement

There have been no changes in the information previously submitted by Microsoft in its jurisdictional statement pursuant to Rule 29.6.

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Appellees portray Microsoft's principled position that appellate review in this case should follow the normal course as an effort to delay resolution of its appeals. (DOJ Br. at 2, 16 n.14.) That accusation is unfounded. No one is more anxious than Microsoft to see this case brought to a prompt conclusion. But the benefits of comprehensive review by the court of appeals far outweigh whatever time, if any, might be saved by direct review in this Court. As Justice Burton cautioned in the Steel Seizure Case, which, unlike this case, presented a true national emergency:

> The need for soundness in the result outweighs the need for speed in reaching it. The Nation is entitled to the substantial value inherent in an immediate consideration of the issue by the Court of Appeals. Little time will be lost and none will be wasted in seeking it.

Youngstown Sheet & Tube Co. v. *Sawyer*, 343 U.S. 937, 938 (1952) (separate opinion of Burton and Frankfurter, J.J.). Contrary to appellees' assertions, nothing about this case justifies a departure from normal appellate practice. The issues raised by these appeals instead deserve "all of the wisdom that our judicial process makes available." *Id.*

1. The Expediting Act Gives This Court Unqualified Discretion To Deny These Direct Appeals. If the district court "enters an order stating that immediate consideration of the appeal by the Supreme Court is of general public importance in the administration of justice," the Expediting Act provides that this Court shall "either (1) dispose of the appeal and any cross appeal in the same manner as any other direct appeal authorized by law, or (2) *in its discretion*, deny the direct appeal and remand the case to the court of appeals." 15 U.S.C. § 29(b) (emphasis added). Even appellees acknowledge that this Court has discretion to deny a direct appeal certified by the district court. (DOJ Br. at 13-14; States Br. at 7.) In fact, appellees expressly advised the district court that "[t]he Expediting Act affords the Supreme Court *broad discretion* to remand an appeal to the court of

appeals if it considers the case inappropriate for its plenary review." (Pls.' Reply in Support of Certification of Direct Appeal at 5 (emphasis added).)

Appellees now contend, however, that this Court's discretion is limited by the "general public importance" standard that guides the district court. (DOJ Br. at 15.) They go so far as to argue that the 1974 amendments gave the courts of appeals jurisdiction over only "routine appeals." (*Id.* at 13.) The plain language of the Act is to the contrary: the "general public importance" standard applies only to the district court's certification decision; this Court's discretion to deny a direct appeal is unqualified.

Nor can appellees find support for their newfound reading of the Act in the legislative history of the 1974 amendments. (DOJ Br. at 14 n.12.) In fact, that history belies appellees' position. Although the House version of the 1974 revisions to the Act made no reference to this Court's discretion, that version was *not* enacted. Appellees refer to a statement in the House Committee Report that the intent was not to give the Court "absolute discretion" to hear a case on direct review, but rather to impose the "general public importance" standard. *See* H.R. REP. NO. 93-1463, at 13-14 (1974). But "the Senate version of the Act's revisions, *in what became the final statutory language*, authorized the Court, 'in its discretion, [to] deny the direct appeal.' As it appears in the statute, the word 'discretion' is unqualified." ROBERT L. STERN ET AL., SUPREME COURT PRACTICE § 2.7, at 53 n.34 (7th ed. 1993) (emphasis added).

Furthermore, "it is the statute, and not the Committee Report, which is the authoritative expression of law." *City of Chicago* v. *Environmental Defense Fund*, 511 U.S. 328, 337 (1994). Here, the statute—which is unambiguous—imposes no limitation whatsoever on this Court's discretion to deny a direct appeal.

2. *AT&T* Was a Very Different Case. Appellees contend that the two appeals of the AT&T consent decree bear "close similarities" to these appeals. (DOJ Br. at 15.) To the

contrary, the issues raised in those appeals were very different from those raised here. As the DOJ stated in urging this Court to accept the direct appeals in *Maryland*:

> The issues raised by appellants are particularly suited to expedited direct review by this Court. The preemptive effect of the federal antitrust decree on state regulatory law, contested in the states' appeals, is purely an issue of law. *Its resolution will not require the Court to examine an evidentiary record, and therefore prior review by the court of appeals is not necessary to facilitate this Court's review.* Similarly, with respect to the private intervenor-appellants' claims that the district court erred in declining to require the modifications they favored, *the Court need not review any complex factual record*. It need only determine whether the district court applied the correct legal standard and acted within its discretion in concluding that the judgment consented to by the parties was in the public interest.

Motion to Affirm at 16, *Maryland* v. *United States*, 460 U.S. 1001 (1983) (Nos. 82-952, 82-953, 82-992 & 82-1001) (emphasis added).

Appellees cannot deny that resolution of Microsoft's appeals will entail a thorough review of a complex factual record. Allowing the court of appeals to conduct that review will aid immeasurably this Court's consideration of the case, and may eliminate the need for this Court ever to intervene. Appellees ask rhetorically what future case would qualify for direct review if this case does not. (DOJ Br. at 18.) The answer is: a case in which the nature of the issues presented and the state of the record make it suitable for direct review by this Court. *AT&T* was such a case; this case is not.

3. The Factual Issues Raised Are Ill-Suited for Direct Review. Appellees' approach to this case is undoubtedly familiar to the Court—they assume that the findings below are unassailable and argue that the case presents only five substantial legal questions. That approach, however, does not

apply here. Because the district court's findings have never been subjected to appellate review, they are not entitled to the deference this Court typically gives findings concurred in by two lower courts under the "two-court rule." *See Berenyi* v. *District Director, INS*, 385 U.S. 630, 636 (1967).

In fact, the findings in this case are not the product of even one level of impartial decision-making. The district court's extensive extrajudicial comments—which appellees understandably make no effort to defend—in combination with (i) its improper decisions regarding the conduct of the trial and (ii) its imposition of draconian relief without holding a hearing, cast serious doubt on the reliability of the district court as finder of fact. Once appellees' false assumption that this case is just like the typical case the Court considers on certiorari is dispelled, the magnitude of the task ahead is clear. Plenary appellate review of the decision below will require a thorough vetting of the district court's findings so that consideration of the many substantial legal questions presented is grounded in reality.[1]

Appellees halfheartedly argue that the record below presents no obstacle to direct review. (DOJ Br. at 25-28.) For example, they attempt in a footnote to defend the district court's failure to cite any record evidence in its lengthy findings. (*Id.* at 27 n.28.) Although a district court is not required to identify the record evidence that supports its findings, *Amadeo* v. *Zant*, 486 U.S. 214, 228 (1988), the district court's failure to do so here would add considerably to the Court's burden were it to hear the appeals directly. As the Court once observed:

[1] What is more, appellees have taken liberties with the district court's findings. For example, they imply that Microsoft threatened to terminate the Windows license of any OEM that preinstalled Navigator. (DOJ Br. at 7.) That suggestion is false and unsupported by the cited finding. (Findings ¶ 203 (A140).) Moreover, the district court expressly found that "Microsoft's license agreements have never prohibited OEMs from pre-installing programs, including Navigator, on their PCs and placing icons and entries for those programs on the Windows desktop and in the 'Start' menu." (*Id.* ¶ 217 (A147-48).)

> We have also been hampered by the absence of transcript citations in support of the District Court's findings. It is to be remembered that in a direct-appeal case like this one, we must apply the "clearly erroneous" standard of Fed. Rule Civ. Proc. 52(a), just as the courts of appeals must in cases governed exclusively by 28 U.S.C. §§ 1291 and 1292. We welcome any assistance in performance of that role, as do, undoubtedly, the courts of appeals.

United States v. *Marine Bancorp.*, 418 U.S. 602, 615 n.13 (1974) (citation omitted).[2]

Appellees also unsuccessfully try to refute (DOJ Br. at 28 n.29) the two examples of clear factual error provided by Microsoft (J.S. at 18-19). *First*, they assert that the district court correctly found that Microsoft "largely succeeded in exiling Navigator from the crucial OEM distribution channel." (Findings ¶ 239 (A159).) Yet the two exhibits on which appellees rely, GX 421 and GX 2116, together show that Navigator was being distributed by Compaq, Fujitsu, Gateway, Hewlett Packard, IBM and Sony—six of the world's largest OEMs. Appellees also challenge DX 2440's statement that Navigator was included on "22% of OEM shipments with minimal promotion," arguing that the phrase

[2] Appellees note that "a judge does not commit reversible error in admitting hearsay in a bench trial unless the judge improperly relies on that evidence." (DOJ Br. at 23.) Here, the findings make it impossible to ascertain the extent to which the district court relied on hearsay because there are no citations. A review of the record, however, will reveal that such reliance is highly likely. For instance, the district court itself marked as Court Exhibit 1 (Jan. 6, 1999 a.m. Tr. at 44-45) an op-ed column from the *Washington Post* (David Ignatius, *Knowing When Not To Compete*, WASH. POST, Jan. 6, 1999, at A25). The district court later questioned both sides about a statement attributed to Steve Ballmer, Microsoft's CEO, by *PC Week*. (May 24, 2000 p.m. Tr. at 4, 6, 20.) And in its memorandum accompanying its final judgment, the district court stated that it had concluded that structural relief was appropriate in part because "Microsoft officials have recently been quoted publicly to the effect that the company has 'done nothing wrong.'" (A249.)

"with minimal promotion" means that an icon for Navigator was not pre-configured to appear on the Windows desktop. That reading is inconsistent not only with the language of DX 2440, but also with the testimony of appellees' own economist. Fisher read the phrase "minimal promotion" to mean that Netscape had achieved the stated level of distribution without *paying* OEMs for shipping Navigator. (June 3, 1999 a.m. Tr. at 52.)[3]

Second, appellees argue that the district court correctly found that Microsoft "bound" Internet Explorer to Windows "by placing code specific to Web browsing in the same files as code that provided operating system functions." (Findings ¶ 161 (A122).) According to appellees, Jim Allchin admitted that "Windows 98 contains code used only to browse the Web." (DOJ Br. at 28 n.29.) Allchin testified only that "[i]f you define Web browsing as meaning HTTP [Hyper Text Transfer Protocol], then there is some code specifically that deals with HTTP." (Feb. 2, 1999 a.m. Tr. at 65.) He said nothing, however, to support the finding that Microsoft "mixed" code specific to Web browsing with code specific to operating system functions in the same files. Alchin also testified that Windows 98 contains "an incredible amount of code that's shared" between Web browsing and other operating system functions (*id.* at 66), thus refuting appellees' assertion that Windows 98 contains a standalone Web browser that can be neatly excised from the operating system.[4]

In any event, a finding of fact is "clearly erroneous" under Rule 52(a) "when although there is evidence to support it, the reviewing court on the *entire evidence* is left with the

[3] GX 2116 also shows that to the extent a Navigator icon was not included on the Windows desktop, Navigator was included in the Windows "Start" menu—the primary means of accessing programs—and thus was readily accessible to users.

[4] In fact, counsel for Netscape advised the DOJ in March 1998 that "it simply is not possible to delete any portion of IE, or of browser functionality, from Windows 98 as presently configured without severely interfering with the operating system." (DX 35 at ATR-10980.)

definite and firm conviction that a mistake has been committed." *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395 (1948) (emphasis added). This Court should leave to the court of appeals the onerous task of reviewing the "entire evidence" to identify the many factual errors made by the district court. Although this Court is obviously fully capable of reviewing the record for such errors, it would plainly benefit from initial review by the court of appeals. *See* Report of the Study Group on the Caseload of the Supreme Court, 57 F.R.D. 573, 599 (1972) ("Even when the record is adequate, direct appeal means that the Supreme Court does not have the benefit of the preliminary screening and sharpening of issues that the courts of appeals ordinarily provide."). There is no reason for this Court to forgo those benefits in order to hear Microsoft's appeals now.[5]

4. The Legal Issues Raised Are Ill-Suited for Direct Review. Appellees suggest that the list of legal issues set out by Microsoft (J.S. at 21-23) was concocted by "[i]maginative appellate counsel" in an effort to overstate the complexity of this case. (DOJ Br. at 19 n.17.) To the contrary, that list reflects the efforts of Microsoft's counsel to identify "questions that are worthy of the appellate court's consideration." (*Id.*) What appellees fail to recognize is that appeals in antitrust cases of this magnitude inevitably involve myriad complicated issues. For this reason, the defendants' briefs in *Brown Shoe Co.* v. *United States*, 370 U.S. 294 (1962), and *United States* v. *Grinnell Corp.*, 384 U.S. 563 (1966), were

[5] Appellees assert that this Court has not been "daunted by large antitrust records in exercising its certiorari jurisdiction." (DOJ Br. at 26.) In cases like *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993), and *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, 475 U.S. 574 (1986) (DOJ Br. at 26 n.25), however, the Court had the benefit of prior review by the court of appeals and limited its grant of certiorari to a few discrete legal questions. In fact, the Court expressly stated in *Matsushita* that it had reviewed "only the standard applied by the Court of Appeals in deciding th[e] case, and not the weight assigned to particular pieces of evidence." 475 U.S. at 577.

211 and 189 pages long, respectively, and the Court required more than one Term to decide those cases. (J.S. at 27 & n.5.)

Appellees seek to minimize the complexity of the legal issues raised here by downplaying some and ignoring others. For example, in their statement of the case, appellees relegate the discussion of their tying claim—the linchpin of their complaints—to a footnote (DOJ Br. at 11 n.9), and they elsewhere characterize that claim as "another matter that is not necessary to support the prescribed relief" (*id.* at 22). Appellees' effort to deflect attention from the cornerstone of their monopolization case speaks volumes about the flaws in the district court's judgment.

On the clearest procedural errors below, appellees are conspicuously silent. They state that the district court's entry of final judgment without a hearing on relief "should not detain the Court." (DOJ Br. at 25 n.23.) It is undoubtedly true that this issue can be resolved quickly—not because it is frivolous, but because the district court's refusal to afford Microsoft an opportunity to present evidence and its total reliance on inadmissible hearsay in fashioning relief was patently improper. Appellees contend that the trial itself "provided an adequate basis for determining the scope of relief." (*Id.*) But it is impossible to reconcile that contention with appellees' decision to file six lengthy declarations in support of their proposed final judgment. Plainly, appellees themselves did not regard the trial record as sufficient.

Appellees do not even attempt to defend the district court's extrajudicial statements to the press. They instead argue that those statements do not provide an independent basis for reversal. (DOJ Br. at 20 n.18.) Assuming, *arguendo*, that were so, appellees overlook the additional question of whether the district court's improper dealings with the press require disqualification under 28 U.S.C. § 455 in the event this case is remanded. The final judgment, by its terms, contemplates future proceedings in the district court if the judgment is affirmed. (A254-57, A271.) The court of appeals should have an opportunity to decide the disqualification

question in the exercise of its supervisory authority over the district court. *In re IBM*, 45 F.3d 641, 642-43 (2d Cir. 1995) (referring to "newspaper interviews given by the Judge concerning IBM's activities" as one basis for recusal).

5. Appellees' Other Arguments Are Unavailing. Appellees argue that expedition is justified because the district court "stayed its judgment pending appeal." (DOJ Br. at 18.) They contend that "[n]o firm in the affected industries can confidently plan or commit resources until it knows whether or when the final judgment will take effect." (*Id.*) As an initial matter, appellees' claim of paralysis in the high-technology sector is wildly exaggerated, as evidenced by the continuing flow of capital into that sector and the countless new product introductions. More fundamentally, the district court would not have stayed its judgment had it believed—as appellees contend—that immediate relief was necessary to prevent serious harm to the Nation's economy.[6]

Relying on *IBM* v. *United States*, 480 F.2d 293 (2d Cir. 1973), *cert. denied*, 416 U.S. 980 (1974), appellees also argue that allowing the court of appeals to review this case would contravene the Expediting Act's prohibition of "piecemeal appeals." (DOJ Br. at 29.) The "piecemeal appeals" referred to in *IBM*, however, were interlocutory appeals taken prior to entry of final judgment. 480 F.2d at 295-96. In this case, final judgment has been entered.

At bottom, appellees imply that because the DOJ[7] has not routinely sought direct review under the Expediting Act, it is

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[6] In the *AT&T* appeals, the district court cited the *absence* of a stay and the imminence of the agreed divestiture as a reason for certifying the case for direct appeal. *United States* v. *Western Elec. Co.*, 1983-2 Trade Cas. (CCH) ¶ 65,596, at 68,972 (D.D.C. Sept. 7, 1983); *United States* v. *Western Elec. Co.*, 1982-83 Trade Cas. (CCH) ¶ 65,130, at 71,311 (D.D.C. Nov. 10, 1982).

[7] Appellees contend that the States are "parties to the proceeding" under Rule 18.2. (States Br. at 11-12; DOJ Br. at 29 n.30.) But Rule 18.2 does not confer jurisdiction where it does not otherwise exist; it assumes the existence of such jurisdiction. The Expediting Act does not confer

entitled to deference when it makes such a request. (DOJ Br. at 15.) Of course, the DOJ had little choice but to seek certification after the district court expressly requested it to do so. (April 4, 2000 Tr. at 11.) More importantly, the Expediting Act confers no special right on the DOJ to seek direct review. Rather, *either* party can make such an application, and the fact that the DOJ has done so here (but not in other cases) says nothing about the suitability of this case for direct review. The Court should exercise its discretion to deny these direct appeals and remand the case to the court of appeals.[8]

Respectfully submitted,

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jurisdiction on the Court to hear Microsoft's appeal in the States' separately filed action. (J.S. at 27-28.)

[8] The amicus briefs merit little response. Their scurrilous accusations based entirely on press clippings and other hearsay are emblematic of the sensational manner in which this case was tried. That said, the reversal of position by Judge Bork, counsel of record for one of the amici supporting appellees, warrants mention. Two months ago, Judge Bork was quoted as referring to appellees' effort to secure direct review in this Court as "a futile gesture," stating, "I don't quite see the national emergency." Howard Mintz, *Microsoft Appeals Process Could Drag on for Years*, SAN JOSE MERCURY NEWS, June 8, 2000, at A1. He also was quoted as saying, "I don't know why this case should be treated like it's some kind of an earthquake . . . . I kind of doubt that the Supreme Court would grant it." *Fate of Microsoft May Hinge on Appeals Court*, SEATTLE TIMES, June 8, 2000, at A1. Judge Bork's initial reaction was correct, and he offers no explanation for his change of view.

OPINION

SUPREME COURT OF THE UNITED STATES

MICROSOFT CORPORATION

00–139 *v.*

UNITED STATES ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

NEW YORK, EX REL. ELIOT SPITZER, ATTORNEY GENERAL OF NEW YORK, ET AL.

00–261 *v.*

MICROSOFT CORPORATION

ON PETITION FOR WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 00–139 and 00–261. Decided September 26, 2000

In No. 00–139, the direct appeal is denied, and the case is remanded to the United States Court of Appeals for the District of Columbia Circuit. The Clerk is directed to issue the judgment forthwith.

In No. 00–261, the petition for a writ of certiorari before judgment is denied.

JUSTICE BREYER, dissenting in No. 00–139.

I would note probable jurisdiction in this case. 15 U. S. C. §29(b). The case significantly affects an important sector of the economy—a sector characterized by rapid technological change. Speed in reaching a final decision may help create legal certainty. That certainty, in turn, may further the economic development of that sector so important to our Nation's prosperity.

I recognize that there are competing considerations. A court of appeals proceeding would likely narrow, focus, and initially decide the legal issues now presented here. It

would thereby facilitate any later deliberation in this Court. Nonetheless, I believe this Court can consider the issues fully now by taking additional briefs and by granting additional time for oral argument, if necessary. Consequently, I would hear the appeal.

STATEMENT OF CHIEF JUSTICE REHNQUIST.

Microsoft Corporation has retained the law firm of Goodwin, Procter & Hoar in Boston as local counsel in private antitrust litigation. My son James C. Rehnquist is a partner in that firm, and is one of the attorneys working on those cases. I have therefore considered at length whether his representation requires me to disqualify myself on the Microsoft matters currently before this Court. I have reviewed the relevant legal authorities and consulted with my colleagues. I have decided that I ought not to disqualify myself from these cases.

28 U. S. C. §455 sets forth the legal criteria for disqualification of federal magistrates, judges, and Supreme Court Justices. This statute is divided into two subsections, both of which are relevant to the present situation. Section 455(b) lists specific instances in which disqualification is required, including those instances where the child of a Justice "[i]s known . . . to have an interest that could be substantially affected by the outcome of the proceeding." 28 U. S. C. §455(b)(5)(iii). As that provision has been interpreted in relevant case law, there is no reasonable basis to conclude that the interests of my son or his law firm will be substantially affected by the proceedings currently before the Supreme Court. It is my understanding that Microsoft has retained Goodwin, Procter & Hoar on an hourly basis at the firm's usual rates. Even assuming that my son's non-pecuniary interests are relevant under the statute, it would be unreasonable and speculative to conclude that the outcome of any Microsoft proceeding in this Court would have an impact on those

interests when neither he nor his firm would have done any work on the matters here. Thus, I believe my continued participation is consistent with §455(b)(5)(iii).

Section 455(a) contains the more general declaration that a Justice "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." As this Court has stated, what matters under §455(a) "is not the reality of bias or prejudice but its appearance." *Liteky* v. *United States*, 510 U. S. 540, 548 (1994). This inquiry is an objective one, made from the perspective of a reasonable observer who is informed of all the surrounding facts and circumstances. *See ibid.*; *In re Drexel Burnham Lambert, Inc.*, 861 F. 2d 1307, 1309 (CA2 1988). I have already explained that my son's personal and financial concerns will not be affected by our disposition of the Supreme Court's Microsoft matters. Therefore I do not believe that a well-informed individual would conclude that an appearance of impropriety exists simply because my son represents, in another case, a party that is also a party to litigation pending in this Court.

It is true that both my son's representation and the matters before this Court relate to Microsoft's potential antitrust liability. A decision by this Court as to Microsoft's antitrust liability could have a significant effect on Microsoft's exposure to antitrust suits in other courts. But, by virtue of this Court's position atop the federal judiciary, the impact of many of our decisions is often quite broad. The fact that our disposition of the pending Microsoft litigation could potentially affect Microsoft's exposure to antitrust liability in other litigation does not, to my mind, significantly distinguish the present situation from other cases that this Court decides. Even our most unremarkable decision interpreting an obscure federal regulation might have a significant impact on the clients of our children who practice law. Giving such a broad sweep to §455(a) seems contrary to the "reasonable per-